(16,615.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 128.

JAMES T. SIMMS, APPELLANT,

vs.

HANNAH T. SIMMS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a Supreme Court, Territory of Arizona, *ss:*

—, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify the annexed instrument to be a full, true, and correct copy of the transcript of the record in the case of James T. Simms, appellant, against Hannah T. Simms in the supreme court of Arizona Territory and of all the proceedings had in said cause in supreme court; and I further certify that no opinion has been filed in my office by said supreme court in said cause, and that the citation hereunto annexed is the original citation issued in said cause.

Seal Supreme Court of Arizona.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of Arizona, at Phœnix, the capital of Arizona, this 24th day of May, 1897.

J. L. B. ALEXANDER, *Clerk.*

1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES T. SIMMS, Plaintiff,
vs.
HANNAH T. SIMMS, Defendant.

Now comes the plaintiff above named and complains of the defendant above named, and for cause of action alleges:

I.

That plaintiff and defendant for more than 6 months preceeding the commencement of this action have been and are now *boni fide* residents of the Territory of Arizona and of the county of Maricopa, in said Territory.

II.

That plaintiff and defendant intermarried at Baltimore, in the State of Maryland, on the 12th day of October, 1875, and ever since have been and now are husband and wife.

III.

That on or about the 18th day of December, 1893, said defendant, totally disregarding her duties to plaintiff and the solemnity of her marriage vows, voluntarily and without cause left plaintiff's
2 bed and board with intention to desert and abandon plaintiff, and that defendant ever since has and still continues so voluntarily and without cause to desert and abandon plaintiff and to live separate and apart from him without cause or reason and against the will of plaintiff and without his consent.

IV.

That there is no community property existing between plaintiff and defendant, but that all property now owned by either party hereto belongs to and forms a part of their separate property.

Wherefore plaintiff demands judgment of this honorable court that the bond of matrimony now existing between plaintiff and defendant be dissolved, and that he have judgment for costs.

PIERCE EVANS,
FITCH & CAMPBELL,
C. F. AINSWORTH,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

James T. Simms, being sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on
3 information and belief, and as to those matters he believes it to be true.

JAMES T. SIMMS.

Subscribed and sworn to before me this 4th day of October, 1894.

WADE H. HULINGS,
[NOTARY SEAL.] *Notary Public.*

PHŒNIX, *October 6th*, 1894.

Service of copy of complaint admitted; service of summons in within cause hereby waived, and appearance herein entered by defendant and fifteen days taken to answer.

KIBBEY & ISRAEL,
Attorneys for Defendant.

(Endorsement:) Title of the court and cause. Complaint. Filed October 6th, 1894, 4.10 p. m. J. E. Walker, clerk.

Answer.

Title of the Court and Cause.

Comes now the above-named defendant, and for answer to the complaint herein says—

That the defendant admits the first and second paragraphs of the said complaint.

That the defendant denies the third and fourth paragraphs of the said complaint and each and every allegation contained in the said paragraphs and the whole thereof.

4 Therefore the defendant prays that the plaintiff take nothing by reason of his action, and that the defendant have judgment for her costs and disbursements herein, and as well

such other and further relief as may seem just and equitable in the premises.

KIBBEY & ISRAEL,
Attorneys for Def't.

And the defendant, further answering the said complaint and by way of cross-bill and complaint for affirmative relief and as a cause of action against the said plaintiff, James T. Simms, alleges:

First. That the plaintiff and defendant now are and for more than six months last past before the filing of the said plaintiff's complaint herein were actual, *boni fide* residents of Maricopa county, in the Territory of Arizona.

Second. That the plaintiff and the defendant intermarried in the city of Baltimore, State of Maryland, on the 12th day of October, A. D. 1875, and ever since have been and are now husband and wife, and that there are no children the issue of said marriage.

Third. That the plaintiff on the — day of ——, 1892, was and since said date has been guilty of excesses, cruel treatment, and outrages towards the defendant, and regardless, of his duties as husband, was and has been guilty of extreme cruelty towards the defendant, without any cause or provocation on her part.

5 That about the — day of May, 1893, the plaintiff and defendant were residing in the city of Phœnix, Maricopa county, Territory of Arizona, and at that time were and now are the owners jointly and by selection from the community property of a homestead by them selected from the community property under provisions of the statutes of Arizona in such cases provided, described as follows, to wit:

The south half of the southeast quarter of the northwest quarter of section five, in township one north, of range three east, of the Gila and Salt River base line and meridian, and that at the said date the said homestead was being occupied by two sons of the plaintiff, the issue of a former wife of the said plaintiff, and each aged about 30 years, and that at the said time the said occupancy of the said homestead by the said sons of the plaintiff was by and with the advise, wish, and request of the plaintiff, and that at the time the plaintiff and defendant *was* residing in the said city of Phœnix and not on the said homestead at plaintiff's wish and volition.

That prior to the said date the said sons, for a period of more than eight years, had constantly circulated in the community where the plaintiff and defendant lived false, scandalous, and evil stories and reports against the character of this defendant, and the same had come to the ears of the defendant, and she had communi-

6 cated them to the plaintiff and asked the plaintiff to compel his said sons to desist their said slanderous actions against the defendant, and that the plaintiff had time and again refused to believe that his said sons were so relating said false and derogatory stories and making said false statements of and concerning the defendant, and refused to allow the defendant to prove or to hear any proof of the fact that his said sons were so doing, and refused to speak of the matter to his said sons, and that on the said last-

mentioned date the plaintiff, well knowing that his said sons bore hatred and malice against this defendant, requested that the defendant give up their said home and residence in the said city of Phœnix and to move to the said homestead and there reside with the said sons of the plaintiff.

That the defendant, in deference to the wish of the plaintiff so expressed, did give up the said home and move to the said homestead and there take up her residence, and from that time on exert herself in every way possible to make the home agreeable and happy for the plaintiff and as well for his said sons; that a short time after the plaintiff and defendant commenced living at the homestead the plaintiff begun to treat the defendant in a cold and disdainful manner and to subject the defendant to petty annoyances and to allow the said sons to subject her to annoyances
7 and to deprive her of her buggy or any vehicle to drive to and from the city of Phœnix and the said homestead, and when remonstrated with by defendant plaintiff would and did curse and damn this defendant and make humiliating remarks to her in the presence of his said sons and in the presence of the defendant's lady callers and visitors, and that the said conduct and acts on the part of plaintiff were wholly without cause or provocation on the part of this defendant.

That the said conduct on the part of plaintiff continued almost without cessation until the — day of September, 1893, and that at that date the defendant was informed that the plaintiff was about to institute divorce proceedings against her, and upon charging the plaintiff with said intention the plaintiff informed her that such was his intention, and that he had instructed his attorneys so to do at the November term of the district court in and for Maricopa county.

That the plaintiff did about the — day of September, 1893, write to and cause his attorney to write letters to the defendant's brother in Baltimore, demanding the presence of her brother in Phœnix, and threatening therein that unless he, her said brother, came to Phœnix and adjusted the differences between the plaintiff and defendant that he, the plaintiff, would after September 25th, 1893, commence divorce proceedings against this defendant on the ground of cruel treatment of the plaintiff by the defendant, and that
8 the said threats to so commence proceedings were accompanied with sneering remarks by the plaintiff to the defendant, such as, "I know that you don't approve of divorces," etc., and that at the said times nor at any of the times aforesaid the defendant had not treated the plaintiff in any cruel way, and had constantly and at all times conducted herself towards the plaintiff in an affectionate, dutiful, and wifely manner, and had not given the plaintiff any cause or provocation to sue for a divorce or to so threaten, and that the said conduct and threats on the part of the plaintiff caused the defendant great anguish of mind, shame, and grief and rendered her sick and ill in body and mind.

That during all of the said times the plaintiff allowed his said sons to torment and taunt the defendant and to apply vile and

humiliating language to her and to insult her both in and without the presence of the plaintiff and refused to interfere or to cause his said sons to desist in so doing.

That from the said last-mentioned date until the 14th day of December, 1893, the conduct towards and treatment of the defendant by the plaintiff was the same as hereinbefore alleged, and plaintiff allowed his said sons to continue to heap abuse and ill treatment upon the defendant, all of which kept the defendant ill and
9 caused her incessent anguish of mind and rendered life a burden to her.

That for some time prior to the said 14th day of December the plaintiff would frequently at the dinner table, in the presence of his said sons, say to the defendant, "I want you to pack your trunk and go to the Lemon hotel. I have prepared a room there for you," and that on the said 14th day of December the plaintiff left the homestead and home of plaintiff without any cause or provocation on the part of the defendant and removed his clothing therefrom and has ever since remained and lived separate and apart from the defendant without the will or wish of the defendant.

That prior to the time that the plaintiff so removed from the said homestead one of the plaintiff's sons married, and at the request of the plaintiff moved his family and wife to the said homestead of the plaintiff and defendant, and there domiciled himself and family in the house of the said parties, and that when the defendant remonstrated with the plaintiff against giving up their home to the son of plaintiff the plaintiff cursed and swore at and abused the defendant for so remonstrating.

That on the 18th day of December, 1893, the plaintiff returned to the said homestead in company with one of his said sons and other persons, and, entering the home of the plaintiff and defendant and that part of the house formerly occupied by the plaintiff and
10 the defendant and then occupied by the defendant, *and* removed therefrom all of the dining-room and kitchen furniture and took the same away from the defendant, and that the defendant plead with the plaintiff not to take the said furniture from her or from her house, and stated to plaintiff that she, defendant, needed said furniture, and especially the stove, in order to prepare her daily food and meals, and that the plaintiff then and there said to the defendant, "I need the stove and all these things (meaning the kitchen and dining-room furniture), and your credit is better than mine."

That the defendant then informed the plaintiff, and the statement was true, that she had no money with which to purchase another stove or other furniture and no money for her support, but that the plaintiff refused to allow her to have said stove and furniture or to make any provision for her support and removed the said property to another part of the house occupied by his son and son's wife and delivered the same to them and then left the house and homestead.

That the plaintiff thereafter and on said date went to and visited the various stores and places of business where the plaintiff and

defendant had formerly procured and were then procuring food, groceries, meat, milk, wood, and the various necessaries of life and instructed and gave orders to the said persons and business
11 men and houses not to furnish the defendant any further with any of the said necessaries or to charge his account with any purchases of any of said things made by the defendant, as he would not pay for the same and he would not be responsible for any debts of any character that were contracted by the defendant, and from the said date the said persons refused to give any credit to the defendant for any necessaries, and the defendant was and has been compelled to and has solely supported and maintained herself without any assistance from the plaintiff and from moneys obtained on the faith and security of her separate property.

That after the said plaintiff had left and abandoned the home of plaintiff and defendant, as aforesaid, the plaintiff did, for the purposes of harrassing and annoying the defendant and with full knowledge of the fact, allow and keep and support his said two sons and their wives in the house of plaintiff and defendants and in the whole thereof, except two rooms occupied by the defendant, and the said sons did daily abuse and annoy the defendant with rude and insulting remarks and language and jibes, sush as, "You remind me of Ryder Haggard's She," "Old false-face," "Old hypocrite," "Old liar," and many insulting expressions and remarks.

That the said sons did, moreover, daily and nightly create great noises in and upon the outer walls of the rooms occupied by
12 the defendant by throwing heavy miss-les against the doors and walls and did keep the defendant constantly freightened and in a nervous and excited condition.

That the defendant wrote to the plaintiff at his place of residence, in Phœnix, telling him of the constant conduct of his sons toward her and begging the plaintiff to interfere and save the defendant from the insults and worry and fright caused her by reason thereof, but that the plaintiff, though receiving the said letter through the hands of a personal carrier, refused and wholly neglected in anywise to attempt to have the said conduct of his said sons stopped or to in anywise interfere; but, on the contrary, gave countenance and approbation to the same and daily visited his said sons at said homestead and remained for hours in company with them and their said wives, and at no time did he speak to or come into the part of the house occupied by the defendant, but at all times wholly ignored the presence of the defendant in the said house.

That the said acts and conduct of the said sons of plaintiff were each and all without cause or provocation on the part of this defendant, and did cause her great mental suffering and worriment of mind and rendered her sick with nervous fear and fright, and caused her to believe at times that her life was in danger, all of which was well known to the plaintiff.

That the said conduct and actions, as before alleged, on
13 the part of the plaintiff and his said sons continued from time to times, hereinbefore alleged, continuously up to the

time of the filing of the plaintiff's complaint in this action in this court.

That the said acts on the part of the plaintiff and as herein alleged have caused and were intended by the plaintiff to cause the defendant great anguish of mind and physical and mental suffering, and rendered her sick and ill in body and rendered her life burdensome, stricken her with grief, and made life almost unbearable to her.

And for another and affirmative answer and by way of further cross bill and complaint for affirmative relief the defendant alleges that the plaintiff and defendants are each residents of Maricopa county, Territory of Arizona, and have been actual and *bona fide* residents in the said county and Territory for more than six months last past.

That the plaintiff and defendant intermarried at Baltimore, in the State of Maryland, on the 12th day of October, 1875, and ever since have been and now are husband and wife.

That on the 14th day of December, 1893, the plaintiff, disregarding his marriage vows and without cause or provocation on the part of the defendant and without the will, wish, or consent of the defendant, willfully deserted and abandoned the defendant and left the defendant at the home of the plaintiff and defendant, and
14 ever since the said date has continued to abandon and desert and live apart from the defendant, and has continuously since said date refused to live with the defendant.

That since the said 14th day of December, 1893, the plaintiff has failed and refused to furnish the defendant with the necessaries of life and refused to contribute to the support of the defendant in any way, though having the means and ability so to do, and has compelled the defendant to maintain and support herself.

That in the year 1886 the plaintiff and the defendant were the owners of a large amount of land and water rights in the county of Maricopa, Territory of Arizona, the legal title to which stood in the name of the plaintiff, and that all of the said property was community property, and had been purchased and acquired wholly with money that had been earned by the community after the intermarriage of the plaintiff and defendant, and that on the first day of November, 1887, and on the 12th day of October, 1888, the plaintiff and defendant declared and selected out of the said community property a homestead on the south half of the southeast quarter of the northwest quarter of section number five, in township one north, of range three east, of the Gila and Salt River base line and meridian, which is the same property hereinbefore described and the place of present domicile of the defendant.

15 That on the 10th day of June, 1889, the defendant and the plaintiff, at the instance and request of the plaintiff and at plaintiff's suggestion, entered into an agreement of division of all of the said community real property, save and except the said homestead, by the terms of which said agreement the said plaintiff conveyed to this defendant all of the southwest quarter of section 32, in township 2 north, of range 3 east, of the Gila and Salt River base line and meridian, and reserved and received, with the exception of

the said homestead, all other of the said community real property, which then was and now is greater in extent and acreage and of more value than the said described property conveyed to the defendant, and plaintiff as well by the terms of the said agreement reserved and received as his separate property all real estate that he might acquire at any time subsequent to the date of the said agreement.

That from the time of the said division of property to the present time the plaintiff has refused to furnish the defendant any money for the purpose of paying any of her personal expenses or for her clothing and has refused to pay any of her bills contracted in that behalf.

That at the time of the execution of the said agreement of division of said community property the plaintiff further agreed to deliver to
16 the defendant, as appurtinent to the said land conveyed to her and out of the community property then owned by them for use with the said land and as part of the consideration for the said agreement, two water rights, No. 53 and No. 71, in the Maricopa canal, a corporation, and that the said plaintiff failed to deliver or transfer the same to the defendant and still holds and owns the same, and that the same are necessary to the irrigation and cultivation of the said land of the defendant.

That the plaintiff agreed to and with the defendant, at the time of the said division of the said property, that he would keep the taxes paid on the same, and that in the year 1894 the defendant learned for the first time that the taxes were unpaid at the time of the said transfer to her of the said land and were still unpaid and due in the amount of $944.00, and that at the said time the plaintiff told the defendant that he could not pay the same and advised and compelled the defendant to mortgage the said land for $2,000.00 and pay the said taxes, and as well all debts that the defendant had contracted and owed for personal expenses, necessaries for herself, and clothes, and that plaintiff did then and there borrow of and from the defendant $400.00 of the said $2,000.00 for his personal use, no part of which has ever been repaid to the defendant.

That the plaintiff has since the said agreement had and used the
17 said land of the defendant for pasturage and derived large revenue therefrom, which is in amount unknown to the defendant, and which money he has failed to account for or pay over to the defendant.

That in the month of July, 1893, the plaintiff, under the plea of his great need for money, induced the defendant to further mortgage her said land for the sum of $2,000.00 for the use and benefit of the plaintiff, and that she did, for the purpose of securing a note in that amount, mortgage the said land for the said sum and give the same to the plaintiff, and the plaintiff did use the same in his business and speculations and to his private use, and that the said mortgage is still a lien upon the land of the defendant and now amounts to a sum in excess of $2,500.00, and that the defendant has not paid the same or any part of the same, principal or interest, and refuses so to do, and that the defendant's said land is held as

security for the said money, and that the defendant never had the use or benefit of any part of the said $2,000.00.

That the said defendant is without funds and has no income sufficient to meet the taxes on said land or the interest on said mortgage, and that the defendant has been compelled to, ever since the said abandonment of her by the plaintiff, *to* support herself from the proceeds of notes given to money-lenders and has no money with which to defend this action and no money, means, or income to maintain herself during its pendency, and that the said land
18 of the defendant is so now incumbered by reason of the said mortgages thereon placed by her at the instance of the plaintiff and the liens created thereon by her for support by reason of the failure of the plaintiff to support her, and the abandonment and desertion of her by the plaintiff, as not to permit of further money being borrowed thereon.

Wherefore the defendant prays the orders, judgment, and decree of this hon. court:

First. That the plaintiff be required by the order of this hon. court to pay into the registry of the court a sum of money sufficient to defray all of the costs and expenses of the trial of this action.

Second. That the plaintiff be required by the order of this hon. court to forthwith pay to the defendant's attorneys the sum of one thousand dollars as attorneys' fees in this action.

Third. That the plaintiff be required by the order of this hon. court to pay to the defendant a weekly allowance of fifty dollars as alimony *pendente lite* and for her support during the pendency of this action.

Fourth. That the plaintiff take nothing by reason of his complaint herein.

Fifth. That the plaintiff at the final hearing herein be decreed to pay off and discharge the said mortgages on the said land of
18½ defendant's, and to transfer to the defendant the said water rights.

Sixth. That at the final hearing of this cause a decree be entered forever divorcing the defendant from the plaintiff and dissolving the bonds of matrimony now existing between them and setting aside to the defendant as her separate property the said homestead.

Seventh. That the defendant have judgment for her costs and disbursements herein and such other and further relief as may be just and equitable in the premises.

KIBBEY & ISRAEL,
Attorneys for Defendant.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Hannah T. Simms, being first duly sworn, deposes and says: I am the defendant named in the above and foregoing action; I have heard read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge.

HANNAH T. SIMMS.

Subscribed and sworn to before me this 15th day of October, 1894.

[NOTARY SEAL.] G. C. ISRAEL,
Notary Public.

Title of the court and cause. 2083. Answer. Filed October 18th, 1894. J. E. Walker, clerk. Service of copy admitted Oct. 15th, 1894, by Pierce Evans, C. F. Ainsworth, & Fitch & Campbell, att'ys — p'ff.

19 Title of the Court and Cause.

Comes now the plaintiff, and for this his replication to defendant's answer and first and second cross-bill and complaint alleges:

I.

Plaintiff demurs to the same upon the ground that said cross-bills and complaint fail to state facts sufficient to warrant the court in granting to defendant the affirmative relief therein sought.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Plaintiff.

And should said demurrer be overruled, plaintiff, further answering, denies each and every allegation in said cross-bills and complaint, except as hereinafter expressly admitted.

I.

Plaintiff admits the residence of said parties, as alleged, and that they are husband and wife, and that there are no children the issue of said marriage.

II.

Plaintiff admits the fact to be that in 1886 there existed between the plaintiff and defendant a community estate, consisting of lands and personality in Maricopa county, but specifically denies
20 the fact to be that plaintiff and defendant on the first day of November, 1887, and on the 12th day of October, 1888, or at any other time, selected and declared a homestead out of said lands or any part thereof, or that there now exists or ever existed a homestead claim placed upon any of the lands belonging to said community by the parties to this suit or either of them, as described in defendant's cross-bill, but that the land described in defendant's cross-bill as selected for a homestead is entirely without entry thereon, but free and clear of any charge of homestead whatever.

III.

Plaintiff admits the fact to be that the parties to this suit did, on the 10th day of June, 1889, enter into an agreement of division as to their community property and the whole thereof, but denies the fact to be that said agreement of division related to the real prop-

erty alone; but avers the fact to be that said agreement of division related to all and every nature, kind, and description of property, both real and personal, then belonging to the then existing community estate, and by the terms thereof and of said agreement of division defendant took to herself and as her own separate and undivided estate the S. W. ¼ of sec. 32, T. 2 N., R. 3 E., G. & S. R. B. & M., thereby releasing to plaintiff and vesting in him as his separate estate all of the remaining lands and personalty belonging to said community, and — and extinguishing all the
21 rights existing therein in said community in favor of defendant prior to said agreement of division, exclusive of homestead right or interest therein, as described and claimed by defendant, all of which will more fully appear by said agreement of division, a true copy of which is hereto annexed, marked "Exhibit A," and made a part hereof.

IV.

Plaintiff admits the fact to be that the area and acreage of the lands received by and remaining in him under the term- of said contract of division are greater than that received by defendant, but denies the fact to be that they were of greater value than the portion awarded to defendant, for the reason that said lands retained by plaintiff were incumbered and charged with mortgages and a large portion thereof without a valid and subsisting title thereto in plaintiff, in addition to which plaintiff was otherwise in debt and charged with heavy liabilities, to clear which plaintiff had no other means than the lands owned by him and belonging to said community, whereas the defendant under said contract of division held her portion of said community estate so received by her free and clear of any and every charge, liability, or incumbrance whatever, and when so received was of equal if not greater value than plaintiff's portion of said community.

V.

Plaintiff admits the fact to be that in the month of July,
22 1893, defendant advanced to the use and benefit of plaintiff the sum of $2,000.00 obtained by her by mortgage upon her separate real property and which mortgage plaintiff agreed to pay, but to pay the same plaintiff has been unable and prevented from so doing by reason of the acts of defendant, in that she has at divers and different times and since said contract of division entered into by plaintiff and defendant, as aforesaid, refused to sign conveyances whereby plaintiff would have been able to sell and dispose of certain portions of his lands and thereby procure the money with which to pay said $2,000.00 and accrued interest, but instead, and against plaintiff's will and consent, she has remained in the possession of and claimed to own and have interest in that portion of the land which plaintiff could have sold as aforesaid, and which land was included in and held by him as a part of his separate real estate under said agreement of division, thereby preventing and defeating plaintiff in his endeavors to sell his property or dis-

pose of the same to advantage, and, without the consent of plaintiff or excuse for so doing, continues to remain in the possession of a large portion of plaintiff's separate property, to his great damage and injury, in that during all of the times that defendant has occupied and claimed said property, as aforesaid, plaintiff has been willing and offered to provide defendant with a support and
23 home with plaintiff, but to accept and occupy the same she totally objected and refused.

VI.

Plaintiff denies the fact to be that defendant is without means, but avers the truth to be that she is the owner of and in possession of an estate received from plaintiff, under said contract of division, of the value of from $20,000 to $25,000.00, the annual rentals of which are worth $1,500.00 per annum, which would be amply sufficient for the sup-ort of defendant, but through her neglect to look after and care for her property or allow others to look after and care for it in her behalf the same has become non-productive, and that it is not true that defendant's estate aforesaid is insufficient in value to allow of her employing counsel deeply learned in the law and the furnishing of means sufficient for all her wants during the pendency of this action.

Wherefore plaintiff prays that plaintiff be not required by order of this hon. court to pay to defendant's counsel the sum of one thousand dollars, attorneys' fees, or any other sum, or that plaintiff be required to pay to defendant a weekly allowance of $50.00 per week, or any other sum, as alimony *pendente lite* and for her support during the pendency of this suit or otherwise, but that defendant take nothing by reason of her cross-complaint and prayer.

That plaintiff recover his costs herein incurred.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Att'ys for Pl'ff.

24 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

James T. Simms, being first duly sworn, deposes and says that he is the plaintiff named in the above-entitled action; that he has read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge.

JAMES T. SIMMS.

Subscribed and sworn to before me this 1st day of November, 1894.

[NOTARY SEAL.] J. W. CRENSHAW,
Notary Public.

Service of copy of the foregoing replication and annexed Exhibit A admitted this first day of November, 1894.

KIBBEY & ISRAEL,
Attorneys for Defendant.

EXHIBIT A.

Know all men by these presents that I, Hannah T. Simms, the wife of James T. Simms, of the county of Maricopa, in the Territory of Arizona, party of the first part, and the said James T. Simms, party of the second part, witnesseth:

That for and in consideration of the conveyance to me by my said husband of the southwest quarter (¼) of section thirty-two (32), township two (2) north, range three (3) east, Gila and Salt River base and medirian, in maricopa county, Territory of Arizona, and for other good and valuable considerations given to me by
25 my said husband, James T. Simms, I do for myself and my heirs, executors, administrators, and assigns hereby release, set over, transfer, and assign to my said husband, James T. Simms, his heirs, legatees, devisees, executors, administrators, or assigns, all my right, title, and interest or estate, either real, contingent, or expectant, and of every nature and description whatsoever, in and to the property which my said husband, James T. Simms, may now own or possess or which he may hereafter acquire during his lifetime, intending and meaning by that my said husband, James T. Simms, shall — the right to will or dispose of all his said property as he may see fit, free and clear of any dower, community, or other interest which I might have in my husband's said property were this instrument not made and executed.

In witness whereof I have hereunto set my hand and seal this 10th day of June, A. D. 1889.

HANNAH T. SIMMS.

In presence of—
C. F. AINSWORTH.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, C. F. Ainsworth, a notary public in and for said county of Maricopa, on this day, personally appeared Hannah T. Simms, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that
26 & 27 she executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 10th day of June, A. D. 1889.

C. F. AINSWORTH,
Notary Public, Arizona.

[SEAL.]

(Endorsement:) Title of the court and cause. Replication of plaintiff. Filed November, 1894. No. 2083. J. E. Walker, clerk.

Title of the Court and Cause.

Comes now the defendant in the above-entitled cause, by Kibbey & Williams, Millay & Bennett, and W. H. Barnes, her attorneys,

and moves the court for an order upon the plaintiff herein, James T. Simms, that the said plaintiff pay to the said defendant the sum of five thousand dollars as provisional alimony, to enable this defendant to employ counsel and defend the above action.

This motion is made upon th- papers on file in this cause and the affidavit hereto attached.

BARNES, MILLAY & BENNETT & KIBBEY,
Attorneys for Defendant.

TERRITORY OF ARIZONA, }
County of Maricopa. }

Title of the Court and Cause.

28 Hannah T. Simms, being first duly sworn, on her oath says that she is the defendant in the above-entitled action and is the wife of the plaintiff, James T. Simms; that this action was commenced in this court on the 6th day of October, 1894; that on the — day of ——, 1895, the Hon. A. C. Baker, judge of this court, of his own motion changed the venue in this cause on account of his disqualifications to try the same and set the same for hearing before Hon. J. J. Hawkins, judge of the fourth judicial district of this Territory, and that this defendant has not since the commencement of this action had any opportunity until the present to press the motion for alimony in this case.

Affiant further says that the plaintiff has not since the commencement of this action nor for a long time prior thereto contributed in any manner to the support of affiant; that affiant has one-quarter section of land in Maricopa county, Arizona, and has no other property of any description whatever; that the said quarter section of land is now and at the time of the commencement of this action was heavily encumbered; that the same then was and now is entirely unproductive and brings affiant no income whatever; that since the commencement of this action affiant has been compelled to and has still further mortgaged and encumbered said premises in order to pay the interest on the former encumbrances and the taxes accrued
29 before and since the commencement of this action upon said premises; that affiant is now without the means to pay counsel for her defense of this action, and is destitute of means for her support, and that affiant is informed and believes that the said ¼ section of land is now so heavily incumbered that affiant is unable to raise any further money upon the same by way of mortgage or otherwise, and that said premises cannot now be sold.

Affiant further says that the plaintiff, James T. Simms, is the owner of a large amount of real estate and other property in said Maricopa county; that said real estate consists of farming lands and city lots, among which is the property known as "Simms' addition" to the city of Phœnix, and is the most desirable residence property in said city of Phœnix; that the same is very valuable and is good saleable property, and that the said plaintiff has since the commencement of this action sold and received payment for a large number of lots in said addition, amounting to, as affiant is informed and believes, *to* a sum exceeding $75,000.00; that said

plaintiff has ample means at his disposal, and has no family dependent upon him for support, except this affiant, and is abundantly able to pay to affiant a reasonable amount for her present support and with which to pay counsel for her defense in this action.

(Signed) HANNAH T. SIMMS.

30 Subscribed and sworn to before me this 2nd day of April, 1896.

J. W. EVANS, [NOTARY SEAL.]
Notary Public.

(Endorsement:) Title of the court and cause. No. 2083. Motion for alimony. Filed Apr. 2nd, 1896. J. E. Walker, clerk, by C. H. Knapp, deputy. Received a true copy of the within this 2nd day of April, 1896. Fitch & Campbell, Ainsworth & Evans, att'ys for p'l'ff.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

Title of the Court and Cause.

James T. Simms, being first duly sworn, on oath deposes and says that he is the plaintiff in the above-entitled cause; that he has heard read the affidavit of Hannah T. Simms made in said action on the 2nd day of April, 1896. This deponent says that said Hannah T. Simms is and has been for over five years last past the owner of the southwest quarter of section 32, township 2 north, range three east, and that said quarter section of land is deeded from this deponent to said Hannah T. Simms as her own property and in lieu of all her right, title, and interest in and to any and all other property belonging to this deponent.

Deponent says that at the time he deeded said land to said Hannah T. Simms he verily believed the same was worth the sum of $300.00 per acre; that said land ever since has been and is
31 now worth the sum of three hundred dollars per acre; that said land is equally productive with any land owned by this plaintiff; that the only reason said Hannah T. Simms does not receive any income from said land is for the reason that she refuses to rent the property or to purchase water to irrigate the same, and said land is wholly unproductive without irrigation.

That deponent says of his own knowledge that said Hannah T. Simms has always claimed that said land was worth $400 per acre; that the agent who has said land in charge has repeatedly claimed that they held said land and would not sell the same for less than three hundred dollars per acre; that said land is, in deponent's judgment, worth the sum of $48,000.00; that said deponent is informed and verily believes — to be true that said land is not mortgaged for more than $8,000.00. This deponent further says that he has no productive property whatever; that he owns several tracts of land, every foot of which is mortgaged, and that the taxes and in-

terest on the mortgages on said lands—all the lands owned by him—are three times the income derived therefrom.

That this plaintiff owns a portion of what is known as Simms' addition to the city of Phœnix; that said addition is comprised in the plat of thirty-six acres and no more; that the most valuable piece of said Simms' addition is occupied by the said Hannah T. Simms; that since the said Hannah T. Simms deserted this
32 plaintiff on the 14th day of December, 1893, this deponent has not received from the sale of lots in the said Simms' addition to exceed the sum of six thousand dollars in cash or money or its equivalent; that this deponent has sold several lots at a very low figure for the purpose of inducing people to build thereon, and that all the money derived from the sales of the lots of Simms' addition since December, 1893, would not exceed six thousand dollars, all of which has been expended for the payment for improvements and taxes on this property; that this deponent has year by year for the past three years only been able to pay his taxes and interest by increasing the mortgages on his real estate.

That the said Hannah T. Simms is worth today in property more, after payment of her debts against the same, than this deponent believes himself to be worth over and above the mortgages and indebtedness that he now owes.

This deponent says that the said Hannah T. Simms is, in his judgment, worth the sum of thirty thousand dollars over and above her debts and liabilities, and has ample means to support and maintain herself and to pay counsel fees; that deponent knows of his own knowledge that in this suit now pending she has employed six different attorneys; that she has sufficient property and means out of which to pay her said attorneys. Deponent says that no application has been *been* made upon him to pay suit money or
33 alimony until the second day of April, 1896.

JAMES T. SIMMS.

Subscribed and sworn to before me this 4th day of April, 1896.

A. J. EDWARDS,
Notary Public. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

William S. Pickrell, being first duly sworn, deposes and says that he resides in the city of Phœnix, Arizona; that he is well acquainted with James T. Simms and Hannah T. Simms, and that he knows the southwest quarter of section thirty-two, town two north of range three east; that said property belongs to the said Hannah T. Simms, as he is advised by the said Hannah T. Simms.

That in the month of November, 1895, he attempted to purchase of the said Hannah T. Simms a portion of said quarter section, to wit, ten acres with a frontage on Centre street equal to one-half its depth, said land to be taken part of the way up from the southeast corner of said quarter section—that is to say, at least ten acres was to be taken off from the corner before he should have the right to select his piece of ten acres; that he offered said Hannah T. Simms

the sum of $250.00 per acre for said land; that said Hannah T. Simms referred this deponent to her agent, J. W. Evans; that
34 this deponent then consulted the said J. W. Evans, as agent of said Hannah T. Simms, and he was informed by said J. W. Evans that he could not purchase said ten acres for less than three hundred and fifty dollars per acre; that said J. W. Evans informed this deponent that said quarter section was held at and they were going to make it bring forty-eight thousand dollars, and that they didn't propose to sell it until they realized that price for said quarter section.

This deponent say- that he was ready and willing and had the money in cash to pay at least two hundred and fifty dollars per acre for ten acres situated anywhere within a reasonable distance from the southeast corner of said quarter section with a width on Centre street of one-half its depth.

W. S. PICKRELL.

Subscribed and sworn to before me this 4th day of April, 1896.

C. F. AINSWORTH,
Notary Public. (NOTARY PUBLIC SEAL.)

(Endorsed:) No. 2083. Title of the court and cause. Filed April 6th, 1896. J. E. Walker, clerk. Service of copy of within affidavit admitted. Millay & Bennett, of counsel for defendant.

35 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Title of the Court and Cause.

Hannah T. Simms, being first duly sworn, on her oath deposes and says that she has heard read the affidavits of James T. Simms and William S. Pickrell, filed in this cause.

Affiant says that it is true that she is the owner now of the southwest quarter of section 32, in township 2 north, range three east, but that it is untrue that affiant received this property from James T. Simms as her share of the community property; that the fact is that the said James T. Simms deeded and conveyed to affiant the ½ section of land above described, and also another quarter section of land adjoining it and of equal value, making a total of 320 acres of land; that said conveyance was made about five years ago, and at that time the said James T. Simms considered the said half section of land to be a reasonable provision to be made for affiant out of his large and valuable property in case of his death; that afterwards and by false and specious promises, among other things, to properly care for and support affiant, said James T. Simms induced affiant to reconvey to him one quarter section of said land without any consideration whatever.

36 Affiant further says that the said quarter section of land now owned by her is vacant desert land, without improvements of any kind, and that the water rights properly belonging to said land have been taken and are now held by the said James T.

Simms; that she has no means whatever with which to purchase water or with which to make improvements upon said premises in order to make it productive, and no water rights upon which to buy water for said land, even if she had the means.

That it is not true that the lands owned by the said James T. Simms are unimproved or unproductive, but that he has large tracts of land improved and well set in alfalfa and from which he derives large revenues by pasturing horses and other stock thereon; that affiant is informed and believes his income is at least $10,000.00 per annum.

Affiant further says that she has heard the affidavit of William S. Pickrell herein; that the ten acres of land referred to in said affidavit was at that time and now is encumbered, together with other property, for an amount greater than the amount said Pickrell claims to have offered for it; that affiant could not get the said encumbrances released, and therefore could not make a clear and unincumbered title.

Affiant further says that the ten acres wanted by Mr. W. S. Pickrell, if taken out of the entire tract, would destroy the selling qualities of the large portion of the balance of said premises, and
37 that she was informed and advised and so believes the fact to be that the selling of said ten acres would materially injure and detract from the value of said premises.

Affiant further says that the said quarter section of land is now encumbered to the extent of $11,500; that she is unable to sell any portion of it; that she has no income whatever and no means with which to supply herself with the necessaries and ordinary comforts of life; that she has been and now is unable to pay her counsel for their services in this case, and that it is untrue that she has employed six different lawyers in this case.

HANNAH T. SIMMS.

Subscribed and sworn to before me this 7th day of April, 1896.
[NOTARY SEAL.] JERRY MILLAY,
Notary Public.

(Endorsed:) Title of the court and cause, etc.

Title of the Court and Cause.

It is ordered on motion of the attorneys for plaintiff, the attorneys for the defendant consenting thereto, that C. H. Holmes, court reporter, be, and he is hereby, appointed referee to take the testimony in said action and report the same to Hon. J. J. Hawkins, judge of the fourth judicial district of the Territory of Arizona, for consideration and judgment.

A. C. BAKER, *Judge.*

38 Consented to.

KIBBEY & ISRAEL,
Ayyorneys for Defendant.

(Endorsed:) Title of the court and cause. Order of court appointing referee. Filed April 3rd, 1895. J. E. Walker, clerk, by Lewis Jordan, deputy.

Title of the Court and Cause.

Order of Court Appointing Referee.

By order of court herein made, C. H. Holmes, court reporter in the third judicial district court of Arizona in and for the county of Maricopa, be, and he is hereby, appointed a referee in the above-entitled cause to take the testimony in said action and report the same to me, the presiding judge therein in said cause, for consideration and judgment.

JNO. J. HAWKINS, *Judge.*

(Endorsement:) Title of the court and cause. Order appointing referee. Filed April 17th, 1895. J. E. Walker, clerk.

Statements of Facts.

Testimony taken at the hearing of said case before C. H. Holmes, referee.

Mr. JAMES T. SIMMS, the plaintiff, being duly sworn, testified in his behalf as follows:

I am the plaintiff in this action. Myself and defendant
39 were married on the 12th day of October, 1875, at Baltimore, Maryland. That plaintiff and defendant are not living together; that she has refused to live with me, and have not lived together as husband and wife since the 14th of December, 1893; that on the 14th day of December, 1893, defendant refus*ing* at plaintiff's request to leave their place of residence on Central avenue, about one-half mile north of the city of Phœnix, and go with him to apartments secured at the Lemon hotel, in said city; that prior to the 14th day of December, 1893, there had been an understanding between plaintiff and defendant that I was to secure rooms at the Lemon hotel and we would go there.

That he told defendant that he had good reasons for moving; that they had lived peaceably together at the Lemon hotel before, and that there was no reason why they could not do so again. Defendant consented to go with me; that she should live in a tent with me, if necessary. I went and engaged the same rooms we had occupied at the hotel before, and told her at the breakfast table about the 5th of December that I had engaged the rooms, and that I wanted her to get ready as soon as she could and we would move there and live as we had done before. She said, When do you want to move? and I said, In two or three days. She said that she
couldn't get ready in that time; that it would take her 5 or 6
40 days to pack up and get ready to move. I told her all right, to go and get ready.

I supposed she had consented to move, for she said she could get ready in that length of time, but I saw no preparations being made and none was made for removal. I moved from there to the Lemon hotel on the 14th of December, 1893, in the afternoon. I told her at dinner table about it; that I was going to go (Mrs.

Lount was present at the time) to the Lemon hotel to live, and that I wanted her to get ready and go with me, for she had ample time in which to get ready. Then she said she had no idea of going. I then went to the Lemon hotel to live. On the 18th of December I went out to the house and served a notice upon her—the original notice. It demanded that she should come to the Lemon hotel and live with me. I handed the paper to her myself and kept a copy of it. We had some little conversation. I moved some of the furniture into the other part of the house, and there was some protestation on her part. I think the paper was about all that passed between us in regard to that.

Q. (Handing instrument to witness.) Is that your signature to that instrument in writing?

A. Yes, sir.

Q. Is that the original of which a copy was served on the defendant on the 18th of December, 1893?

A. Yes, sir; that is the original.

41 Q. Have you and the defendant ever lived together since that time?

A. No, sir. I continued to live till the 20th of June, 1894, at the Lemon house, in this city (Phœnix), and then moved to the Monihon building, on the corner of Washington and First avenue, where I now reside.

The defendant and myself have not lived together since December, 1893; we have met on the streets, but no conversation has passed between us since December 18th, 1893. I have never consented to her living apart from me either directly or indirectly. I was present when the notice was served on her. I handed it to her myself. She sent out to consult her attorney, I believe, and after her messenger had returned she made me an answer. The notice was served in the presence of Mr. Barry and Mr. Metcalf.

Q. I will ask if there is any community property.

By Mr. BENNETT: We object to that. It is wholly a legal conclusion.

A. There is none.

Q. None whatever?

A. None whatever.

By Mr. EVANS: I will offer this notice as Plaintiff's "Exhibit A." (Same, being admitted without objection, was so identified.)

"EXHIBIT A."

PHŒNIX, ARIZONA, *December 18th*, 1893.

42 "I now demand that you come and live with me at the place I have provided for us both at the Lemon hotel, and that all matters and differences heretofore existing between us be forgotten.

"JAMES T. SIMMS.

"To Mrs. H. T. Simms."

"We hereby certify that we witnessed the delivery to Mrs. H. T. Simms, the original of which the foregoing is a copy.

"Dated this 18th of December, 1893.

"A. BARRY.
"E. METCALF."

Mr. BARRY, being called on behalf of plaintiff and duly sworn, testified as follows:

My name is Andrew Barry. I am the Andrew Barry (handing written instrument to witness) mentioned in that notice (Plaintiff's Exhibit A). I have seen that notice before; I recognize it; yes, sir; I do. I don't know as I remember of seeing this particular one. That is my signature to the paper and I recognize the paper, and was present at the time it was delivered to Mrs. Hannah T. Simms. It is pretty hard to remember the conversation that took place between Mr. and Mrs. Simms at the time exactly; it is so long ago.

I think when we went in there Mrs. Simms and the young lady was at dinner, and Mr. Simms went in and offered her the
43 paper. She refused to receive it or to look at it at all; but the young lady that was there offered to go to the attorney for some instructions, for Mrs. Simms wouldn't look at it. The young lady was one that was there; I don't know who she was. She was a freckled-faced, red-haired young-looking woman. She went off and she came back again after a while, and she told Mrs. Simms something, and then Mrs. Simms read the paper. Mr. Metcalf and Mr. Simms and I went out in the meantime to look at some lots on the north of the house, and stayed around so we could keep an eye on the place to see when she returned from town.

When she came back towards the house, and when Mrs. Simms had read the paper, she said to Mr. Simms that she would not go to live with him at the Lemon hotel. I don't remember distinctly the words, but I remember that she spoke very earnestly, saying that she would not go. She said, "I will not go." That is all I remember now.

Cross-examination:

She objected to going to the Lemon hotel to live. I cannot remember the exact words now. The conversation was in the dining-room out at the place north of town. Mr. Simms requested me to go there with him, and in a general way—for what purpose, I didn't know the purport of it, but he asked me to go out there with him to witness the delivery of a paper, some notice to Mrs.
44 Simms, and I think he told me that it was about the same thing. I was invited by Mr. Simms to witness the delivery of the notice. From what Mr. Simms said I understood that I was to witness to a demand made by him.

Q. What official position did you hold at that time?

A. I didn't hold any.

By Mr. EVANS: We object to that as immaterial.

By Judge KIBBEY: What official position did you hold at that time, Mr. Barry?

A. Not any.

Q. But you had been deputy sheriff, had you not?

A. Well, I was in the sheriff's office the year before that. I had been acquainted with the Simms' and the Simms boys for several years, and the old gentleman came to me to go out with him and I didn't like to refuse him. I knew it wouldn't make any difference in the matter, so I went and witnessed it.

Q. And you expected the refusal of the request, did you not?

By Mr. EVANS: We object to that question as calling for a conclusion on the part of the witness.

A. I didn't know anything about it at that time.

Witness excused.

Mr. J. H. BALDWIN, being called on the part of plaintiff, was duly sworn and testified as follows:

45 I am acquainted with Mr. J. T. Simms, the plaintiff in this suit, and I know Mrs. Simms when I see her.

I was not at the Lemon hotel during Mr. Simms' stay there and was not around the hotel during any of that time and only know that he resided there from what he told me. He resided in the Monihan block when I knew him. He stayed there ever since June 20th, 1894, continuously. Mrs. Simms did not live there with him. I know that she has not. He was living there alone all of that time. No one lived with him, only his son is with him at the present time—the one that came here from the East; I don't know his given name.

I know that Mr. Simms has been living in the Monhan building ever since June 20th, 1894—living alone.

Cross-examination.

By Judge KIBBEY:

The Monihon block is a business block and situated in the center of the town on one of its principal streets. The upper story is occupied by secret lodges, the second story by offices, and the first by stores. Mr. Simms is lodging in his office; takes his meals there; has a sign tacked up there—has a sign tacked up there advertising that room as his office. Well, there is where he lives and sleeps; yes.

Redirect examination.

By Mr. EVANS:

46 Families lodge there in that building, yes, and sleep there. Mr. Keefer lives there with his family—occupies rooms there and lives there all of the time.

Recorss-examination by Judge KIBBEY:

Well, there is a widow lives there, and I understand that there is rooms opposite that is occupied. I am the janitor of the building and take care of Mr. Simms' room.

By Mr. EVANS—redirect examination:

I believe no other families have resided there than the one mentioned.

By Judge KIBBEY—recross-examination:

There are other rooms occupied by Dr. Williams, Architect McGinnus, Dr. Hibbard, and Lawyer Franklin, and the Agua Fria Canal Company have an office on the same floor. Mr. Simms has one room on the second story.

JAMES T. SIMMS, being recalled on the part of plaintiff, testified as follows:

I lived at the Lemon hotel over six months. I lived there from December 14th, 1893, to June 20th, 1894. It was my home during that time. I selected it as my place of residence.

Witness excused.

Mr. GEORGE SIMMS, being called on behalf of plaintiff and duly sworn, testified as follows:

47 I am the son of James T. Simms, plaintiff in this action. I know where my father resided from the 14th or 15th of December, 1893, until June 20th, 1894—at the Lemon hotel, in Phœnix. He lived there alone. I never saw the defendant there with him. I visited my father frequently during that time, probably as often as once a week during the time he was living at the Lemon hotel.

Cross-examination:

Prior to that time they lived out at the ranch on Centre street, north of Phœnix. It is about ½ mile from the town ditch. It is a large adobe house that sets back in the yard, with cottonwood trees around it.

Q. It is rather a nice place, isn't it?

A. Yes.

By Mr. EVANS: We object to that as immaterial.

The place was furnished for housekeeping and pleasantly furnished, too, and father lived there up until December 14th, 1893, with the defendant. I am the son of Colonel Simms by another wife. He lived there, I think, from February of the previous year up to that time.

How long it has been their home—I don't remember the exact year, but it was something like since 1882, I think—yes; I think so. I do not know where Mrs. Simms has been staying while father has

been living away from the place. Well, occasionally I have
48 seen her there. I don't know that she has been living there in the house all of the time. I don't know it because I have not been there all of the time; have not seen her frequently. I occupied part of the house and she occupied a part during the same time. That is the old homestead.

Redirect examination:

I lived there from 1892, the last of October, until the first of October, 1894. I was married part of the time and lived there with my family. My brother lived there at the time from December 21st, 1893, until June 15th, 1894. He is married and his wife lived there with him.

Cross-examination:

The brother that I speak of is a full brother of mine.

Witness excused. Plaintiff rests.

Testimony of Defendant.

By Judge KIBBEY: Will plaintiff admit that he received a letter, of which this is a copy, and at the time it bears date?

Mr. EVANS (examining the letter): Yes.

By Judge KIBBEY: We will offer this in evidence (Defendant's Exhibit 2).

By Mr. EVANS: We admit that the plaintiff received a letter, of which this is a copy, but we object to its introduction as im-
49 material, irrelevant, and on the grounds that the letter has not been properly identified.

By Judge KIBBEY (addressing Mr. Evans, counsel for plaintiff): Will you admit that you wrote that letter?

By Mr. EVANS: No, sir. What is the date of that?

By Judge KIBBEY: September 2nd.

By Mr. EVANS: No; and we object to it on the same grounds as above.

By Judge KIBBEY: Well, then, we will ask to recall Mr. Simms.

Mr. JAMES T. SIMMS, plaintiff, being recalled on the part of the defense, was examined, and testified as follows, to wit:

By Judge KIBBEY:

Q. On October 5th, 1893, did you have a lawyer?

A. Yes, sir.

Q. You had an attorney at that time?

A. Yes; I suppose so.

Q. Did you have a lawyer in your employ at that time?

A. Yes; I have always had a lawyer.

Q. Mr. Pierce Evans was your lawyer at that time, was he not?

A. I think I had him employed at that time. I don't remember the date particularly.

Q. (Handing witness letter of date September 15th.) Did you ever see that letter before (identified as Defendant's Exhibit No. 3)?

50 A. Yes, sir.

Q. Did you authorize the sending of this letter (identified as Defendant's Exhibit No. 3)?

A. I did.

Q. Look also at this one of date October 5th and see if you recognize that letter.

A. I do.

Q. Did you authorize the sending of that letter?

A. I did.

Q. Did you write the letter dated September 2nd or authorize its sending?

A. Yes, sir; I did.

Q. You sent that, did you (handing letter to witness)?

A. Yes, sir.

For the purposes of identification we wish to have that marked by the reporter. (Same, being letter of date Oct. 5th, was then identified as Defendant's Exhibit No. 4.)

We will offer all of these in evidence, identified by the referee as Exhibits Nos. 1, 2, 3, and 4, on the part of the defendant.

By Mr. EVANS: We object to their introduction on the ground that they are clearly immaterial, incompetent, and irrelevant, and for the further reason that they have no bearing upon this matter, for they were written as a matter of confidential communication

51 by a party who is not a party to this cause and never had any connection with this case.

By Judge KIBBEY: Look at this letter, please (handing witness Exhibit Defendant's No. 1).

A. I recognize it.

Q. Did you receive a letter from Mrs. Simms of which this is a copy?

A. Yes, sir.

We will renew our offer to introduce these four letters in evidence.

By Mr. EVANS: I will renew my objection.

(Letters admitted subject to the objection, having been heretofore identified as Defendant's Exhibits 1 to 4, both inclusive.)

By Judge KIBBEY: We will now offer this statement of property purchased and sold by James T. Simms, plaintiff, as shown by the records of Maricopa county, including the incumbrances and declarations of homestead.

By Judge CAMPBELL: I am willing to admit that the records of Maricopa county show these transfers, with the exception of the declaration of homestead. The certified copies of those will have to be produced.

By Judge KIBBEY: Yes; we have copies, but they are not certified copies, and we will just offer them and produce them later. They may be considered as offered.

(Statements being admitted was identified as Defendant's
52 Exhibit 5 and attached hereto.)

By Mr. EVANS: It is admitted simply as a record of the different transfers—that they may exist between the different parties therein, to and from, but we further reserve the right, should it develop that this abstract of record and statement is incorrect, to introduce further testimony to show what errors exist; and, further, that it has no relation whatever in regard to the homestead.

By Judge KIBBEY: Then it is admitted as a correct statement of the transfers from and to Mr. Simms in this county, subject to their correction if any inaccuracies may appear, in lieu of introducing the records and deeds, and excepting the declarations of homestead.

By Mr. EVANS: And it is specifically denied that there is any homestead in existence.

By Judge KIBBEY: Very well, then we will have the defendant sworn.

Mrs. HANNAH T. SIMMS, being duly sworn, testified as follows, to wit:

My name is Hannah T. Simms; am the defendant in this action; have been married to Mr. J. T. Simms for 20 years coming October 12th, 1895, and during that time have resided together continuously as man and wife until the 14th of December, 1893. We were living on the ranche part of these years, and then we went on a visit to Baltimore.

53 We were living on the ranch 7 or 8 years; it is on Center street, about ½ mile north of town. It is all in alfalfa. The buildings upon it—there is a large adobe house, a carriage-house, and a frame house; the old part is adobe and the new frame. The house was furnished very comfortably. We had no extras, but we had everything well furnished and very comfortable—I might say, with all the comforts.

When we were there before it was very nicely furnished, but this time it was furnished more plainly. We always considered it a most desirable place of residence. I thought it was the most pleasant place in or about the city. Yes, many large trees surrounded the place. We used to have the streets sprinkled out past our place. We had the ditch water and every arrangement for water from the hydrants, &c.

Q. Did you say it was a shady place, setting back from the street? What did you say about the trees?

Mr. EVANS: What is the materiality of this?

By Judge KIBBEY: What is the appearance of the place?

By Mr. EVANS: We object to that question as immaterial.

A. It is considered the most attractive place about Phœnix.

Mr. Simms and his son George constituted the family just prior to December 14th, 1893; previous to that time, Mr. Simms and his son James, but he married.

Previous to our going to the ranch we were very happy
54 together. We had our little trials, but we were very happy.
(Defendant's Exhibit No. 2) My brother sent that to me. Why, of course I have seen it. He wrote to me and sent it on to me by mail; cannot tell when I got it. It is in Mr. Simms' handwriting. Yes; couldn't tell you that, how long after its date I got it. I don't remember dates very well, and I did not keep track of it. I have not the slightest idea. I couldn't tell you. I got it before the 14th of December, 1893; yes; oh, my! yes. William Dryden is my brother; resides in Baltimore.

(Defendant's Exhibit 3.) I have seen that before; they all came in one package. Yes; a long time before December 14th, 1893, before the separation.

(Def't's Exhibit 4.) I have seen that letter; yes; I received it with the other letters.

(Copy of Plaintiff's Exhibit A.) I have seen that before. I received that on December 18th, 1893, at our home, at the dinner table. I was entertaining some guests at the time I received it from Mr. Simms. I think there was four ladies there at the time; we were at dinner and the door bell rang. Some one went to the door and Mr. Simms entered, accompanied by two gentlemen. There was Mr. Barry and another gentleman that I did not know; it is the Mr. Barry, witness for plaintiff. He entered the room, and without noticing any one at all—there were four ladies there in
55 the room and he came around to me in a very positive manner and said: Read that (handing me this paper) and answer it. He handed me this very paper and demanded an answer. Prior to this he had advised me in a very sarcastic manner not to answer any questions without consulting an attorney, and so when he handed that paper I said to him, "I prefer not to answer this until I have consulted my attorney." Mrs. Fridell was one of the ladies there in the room, and she offered to go and take the paper to my attorney, who, at that time, was Mr. Williams; and when she came back she said that he told me to answer it, and I did. I said, "Mr. Simms, I don't want to leave my home to go to the Lemon hotel, and I will not go to the Lemon hotel. If we must leave here, take me to a tent, or take me to any other place, but not to the Lemon hotel." When I gave him this answer he brought those two men on in and he said to them, Do you hear that? He brought them in to hear my answer to this paper, and he said, "Do you hear that? That is all I want."

The dining-room was at the old home place on North Center street, where I have been living ever since. We were at dinner. I had a few guests there for entertainment. There was Mrs. Donnelly, her daughter, Mrs. Fridell, Miss Buford, and myself. The house was comfortably furnished and — had been keeping house there all of the time. Mr. Simms went out and called in two
56 Mexicans who had been waiting there all day, and he kindly requested me to remove my things from off the table, my silverware, presents, etc.; and then he commenced to move each

article of furniture, dishes, tables,, chairs, the remains of our dinner which was upon the dining table, and everything out of the house. He then took everything out of the kitchen, even the last loaf of bread and the stove. I pleaded with him not to take them, and to leave me, at least, the stove, for I had nothing with which to get a meal of victuals and no stove upon which to cook them; and I pleaded with him to leave me some of the things, but he said that he had use for them and was going to take them, and he took them.

Mrs. Warren went with me to plead with him to let me have the stove, so I could do my cooking, but he said, I have use for these articles, and your credit is better than mine here in town; so he took them. He removed them to another part of the house, and then his son and his wife went to keeping house with them.

When he handed me the paper he remarked in a most positive manner and demanded that I read this paper and answer it. I have not left the home place; I still keep it; but they have nailed up some of the doors. George Simms, his son, he nailed them up the next morning, and my trunk and other things were all thrown out of the back door; just thrown out and left there.

57 We had a conversation prior to the 14th of December, 1893, in relation to going to the Lemon hotel. Yes, it was about the first of December, 1893, that he came to me one day and said, Well, I have been down and engaged rooms at the Lemon hotel, and I wish you would pack your trunk this afternoon and go with me. He always told me that in the presence of his son George—that he had taken rooms at the Lemon hotel and he wanted me to get ready and go there tonight. I said I had other interests there besides a trunk, and that I couldn't get ready to go there at once.

Every now and then, before his son would leave after meals, he would say to me, I wish you would pack up your trunk and go to the Lemon hotel with me tonight. I am going there to live. To which I would make the same answer. I said, I cannot pack my trunk in so short a time and go there to live.

While we were in the East he wrote me and said he wanted to engage rooms again at the Lemon hotel. It was while I was at Baltimore. I wrote him and told him not to make arrangements for those rooms, for they were dark, dreary, and unpleasant; that there was no privacy about them at all, excepting the blinds, and it was a very objectionable place to me, and I objected to his engaging the rooms, and then he wrote that perhaps it would be better not to make any definite arrangements, for we might make a change.

58 I arrived on Saturday night, and on the following Tuesday he was taken ill, and he said, Well, I don't suppose you will like this very much, but houses are very scarce; every other house in town is taken that is suitable. About ten days after that the doctor was there to see him; he was miserable and we dreaded to stay there; we were dissatisfied and we wanted to hunt other quarters; our objections to the place were mutual. I at no time intended to desert my husband; no, sir; I would suffer death before I would do that. He always made plans for our residence on the home place. Yes, excepting the Lemon hotel; yes; I told him I would be willing

to go and live with him at any place, even to living in a tent; I would go and live with him anywhere, but I did not want to go there again. It was never my intention to abandon him.

Judge KIBBEY: We will withdraw our cross-bill. Mr. Referee, you may let the record so show.

Mr. AINSWORTH: We object to the withdrawal of the cross-bill; you may make your application here, but the court will decide that point. You can't do that here.

By Judge KIBBEY: Very well. We will dismiss our cross-bill.

By Mr. EVANS: We object to the dismissal of the cross-bill. You cannot do that at this stage of the trial.

59 By Judge KIBBEY: Well, we have done it already. It is done now.

Cross-examination:

We were married in Baltimore. I was 42 years old. I am 62 years old now. I had only a few hundred dollars when married. After marriage I lived in St. Louis probably two years; from there went to Cañon City, Colorado, and remained there about one month; cannot tell you when I first came to Phœnix to live. I followed my husband in railroad camps up to the time we came here to live. We were in Albuquerque and Las Vegas and other places in New Mexico. I cannot tell the year I came here; it is probably 9 or 10 years ago; first lived at the adobe house at the home place; lived there about 7 or 8 years when I first came here. It was an adobe, and we commenced building the front part at once.

There was nothing there but four rooms, and the rest has all been built since. Some of the trees were planted after we went there to live—in the front yard; I wouldn't say how many of them. I may have lived on the home ranch 7 or 8 years. I gave you my answer as definite as I can. I don't know how to fix the time at 7 or 8 years. I cannot tell, but I think it was that length of time; I don't fix it at that: it is guesswork. I don't positively know.

The house was comfortably furnished; my husband fur-
60 nished it excepting a few little odds and ends that I bought and had given to me as presents.

He generally furnished the house. When we broke up housekeeping to go back on a visit Mr. Simms had rented the farm for two years. He told me that I could have the furniture to sell and dispose of as I saw fit. He said he would give me the money as pin money. No, sir; I don't know what you are getting at. The house was comfortably furnished, and I did nothing towards furnishing it; no, sir; not then; not at that time. I went East after the house — furnished the first time, in 1889. He wanted me to call in a second-hand man to buy it in a lump, but I told him no. I was going to make all I could out of it, and so I sold the furniture piece by piece to get the most I could. The object? Because he had rented the place for two years. We had been tied up pretty close at home and we thought we needed a trip; so we decided to sell and dispose of the things and buy new again upon returning. No; not

I. I did not need the trip. He said that he needed it. He needed the trip. I consented to go on the trip. I never refused him anything excepting the signing of the abandonment of the homestead.

We remained here until the business was settled up; don't know how long. I was very ill, and he engaged rooms for me and
61 I went there, but I did not like the rooms, and I told him I didn't think I would ever be better if I had to go to a Chinese restaurant to eat, and so we got a little house and kept house there near Mr. Kellner's place. It had 4 rooms and it was not furnished. We furnished it. We took articles of furniture that we had sold to friends of ours, and they allowed us to keep them until we could get our business settled up.

We went East in 1889. I recovered pretty well from my illness before going, but I was very weak. It was not on account of my illness that I went East; no, sir. My husband wanted to go to the East to put his sons into business there. I went away to spend the summer; yes, and longer. I was away a year. I don't remember whether it was two years. My husband paid the expenses of the trip after we got there. A part of the time he paid the expenses, but when he left, he left a good large board bill for me to pay; that was when we went away. For some of the board bills he borrowed the money from me to pay them with. He did not give me money in the first place; no, sir; for this money was some of the money that I had to borrow myself on my property. I had to mortgage it to get enough to support me. I did sue him for that money. I was without a cent of money at the time, and I wanted to collect what was due me and I sued him for that money. My married relations with him were very happy, with one exception. We
62 had no trouble between ourselves at all. It was only between third parties. Other parties caused some trouble; that is all. I was not perfectly happy. I don't suppose many people are in this world. I cannot say I was perfectly happy, but we always got along very nicely when we were by ourselves. Third parties always made some, more or less, trouble for us. We were happy after we went to the ranch; yes. I tried to make the best of everything. Well, I don't know that I was extremely happy at St. Louis. I always got along very well, but don't know that I was perfectly happy. We got along very well, and I was happy if no one interferred with me.

Q. Then it is not true, the facts that you allege in your cross-bill—it is not true that he abused you?

By Mr. BENNETT: We object to that, and also to any question in reference to any matters set up in the cross-bill, as the cross-bill has been dismissed by the defendant.

By Mr. EVANS: Then it is not true, as you have stated in this cross-bill, that your husband was guilty of the cruel acts therein stated?

A. I did consider that he was cruel to me.

Q. Then your statement in your direct examination in this case

to the effect that you were very happy together—if such be the case, how is it that you swear to this complaint and cross-bill?

A. He knew that his boys were abusing me. It always came through the third party. We were perfectly happy if it
63 wasn't for the other parties.

Q. Then, as a matter of fact, isn't it true that your husband has always been kind to you personally?

A. No, sir.

Q. Then he has been to the contrary, has he?

A. He has at times.

Q. Then it is not true that you have always lived perfectly happily together?

By Judge KIBBEY: I think I will instruct my client not to answer that question. Mrs. Simms, you may not answer that question.

By Mr. EVANS: Do you answer the question?

A. If my attorney advises me to do so, I will.

By Judge KIBBEY: She refuses to answer the question under my instructions.

By Mr. AINSWORTH: Then the plaintiff moves to strike out all answers of this witness until she answers this question.

By Judge KIBBEY: We object to the questions of counsel because they are not proper cross-examination, and for the reason that they are argumentative, and for the reason that they purport to state the former testimony of the witness imperfectly, and for the reason that we have dismissed our cross-bill, and upon the grounds that we have instructed our client to decline to answer the question.

64 Mr. EVANS: Now, I am going to repeat the question to get it complete in the record. You stated in your direct examination these words: "Our relations previous to the 14th of December, 1893, were very happy." Is that statement true or is it not true?

By Judge KIBBEY: We object to the question.

A. I certainly did not understand it that way. They certainly were not perfectly happy on the 14th of December, 1893.

Q. I am asking the question with respect to prior to that time.

A. I will say they were not.

Q. I think you said that it was previous to your going to the ranch the last time. Is that true?

A. No answer.

Counsel reading from the cross-bill:

Q. You charge in your cross-bill, Mrs. Simms, "that the plaintiff, on and after the — day of ——, 1892, was and since that date has been guilty of excesses, cruel treatment, and outrageous treatment of the defendant, and, regardless of his duties as a husband, was guilty of extreme cruelty without any cause or provocation on your part." Is that true or is it not true?

A. It is true.

By Judge KIBBEY: We object to that question, and move
65 to strike out the answer because it is not cross-examination and it is addressed to the cross-bill, which we have already dismissed.

By Mr. EVANS:

Q. What threats was it he made against you on the 25th of September, 1893, as charged in the complaint?

By Judge KIBBEY: We object to that, and we instruct our client to decline to answer the question on the ground that it is neither cross-examination or proper, and it is addressed to the cross-bill, which we have already dismissed.

By Mr. EVANS:

Q. What threats, if any, did the plaintiff in this action ever make against you?

By Judge KIBBEY: We object to the question, and instruct our client not to answer for the same reasons as above stated.

By Mr. EVANS:

Q. Do you refuse to answer the question?
A. Under the instructions of my attorney, I do.
Q. When was it that the plaintiff caused you great anxiety and grief?

By Judge KIBBEY: You need not answer the question. Mrs. Simms says she declines to answer the question under the instruction of counsel. Our objections to the question are that it is
66 not cross-examination and it is directed to matter contained in the cross-bill, which we have dismissed.

By Mr. EVANS:

Q. State the specific acts of cruelty which you charge against the plaintiff between the 25th of September, 1893, and the 14th of December, 1893.

By Judge KIBBEY: We object to the question for the reason that it is based upon the cross-bill, which we have dismissed, and that the counsel is reading from the cross-bill in framing his questions, and it is not proper cross-examination.

By Mr. EVANS: Do you refuse to answer the question?
A. Under the instructions of my attorneys, I refuse to answer the question.
By Mr. EVANS: Will you state where and at what time the plaintiff in this action was guilty, as charged by you in your cross-bill, of the different acts of cruelty therein alleged?

By Judge KIBBEY: We object to that question and advise our client not to answer it, for it is based on the cross-bill, which we have dismissed.
By Mr. EVANS: Plaintiff, by counsel, now moves to strike out all

of the testimony of the defendant heretofore given in this action upon the ground that she refuses to answer properly put questions and refuses to make a fair statement relative to the subject-
67 matter in this action at issue.

By Judge KIBBEY: The defendant, by her counsel, says that she is willing and ready to answer all proper questions put to her which are addressed as proper cross-examination, and that the record so far discloses that she has answered many and even most of the questions which have been improper, but she objects to have read to her from the cross-bill any matter whatever or to answer any questions which spring from out of any part thereof, but is ready and willing to answer any questions proper and pertinent to the issues remaining in this case.

By Mr. AINSWORTH—cross-examination:

I think it was in 1891 that we came back here. I think it was as early as that; it was in 1891, I think, I came. I don't know whether it was in 1891 or in 1892, but it was in January that we moved out to the ranch; I don't remember what year. I think I came back in January, 1892, and I stayed at the Lemon hotel a short time and then removed to the Heyman house. I think we went there in April and left there in March. We were there not quite a year, I think. I could not tell you positive about that. I think we came back in January, 1892, and then we were living at the Lemon hotel for two or three months and then moved to Heyman's or near there. We weren't there a year.

We did not move in and out again in 1892; I cannot fix the dates; it was in the spring; I cannot give the dates.

68 We lived about 2 or 2½ months at the Lemon hotel. I think we went to live on the farm in March, but I cannot tell you. We did not live on the farm until we went there in April, 1893. No, sir; we were in the East a long time, and then we lived in different houses. He had the place rented for two years at that time. I couldn't tell you whether the farm was rented to Mr. Miller or not; I think not, for George lived there some of the time. I don't know whether it was vacant for a long time, but I could tell by referring to his letters, I suppose. I was back East for some time, and he kept me posted about the renting of the property, but those things I couldn't remember; I am a poor hand at fixing dates in my mind.

I went from here to Baltimore and remained there pretty near all of the time until I came back. That was from 1889 until we returned and stopped at the Lemon hotel in 1891 or 1892. Mr. Mills was keeping the Lemon hotel then, I think.

No, sir; I have not got the envelope in which I received these letters sent to me by my brother. I don't keep envelopes. I don't remember turning them over to Mr. Williams; I don't know where these letters have been since that time. I think I got those letters in one large envelope—a business envelope; I cannot inform you

exactly. I have not got that envelope now; have not looked
69 to see if I have it. No, sir; I don't know whether I turned them over to my attorney or not; I didn't think it was important. I think they were directed to the care of Mr. Thomas; he used to come past the house and bring the mail to me. I read them when I got them; yes, and showed Mr. Simms one of them. I knew nothing of these letters until I received a letter from my niece asking me what it meant, stating that they had received those letters from Mr. Evans and one from Mr. Simms, and it was so long a time after that my brother said that perhaps they would be of some service to me, so he sent them. I received them the same year—a few months afterwards—but I couldn't tell you the month. I don't know whether I had them in December; I don't remember whether I had them when this action was brought. I have had them part of the time and part of the time they were in the hands of my attorneys. Since then I have not had them.

No, sir; I don't know when I turned them over to them. Yes; it was before this suit was brought they were sent to me; thinking that the suit was going on, they came here before that time, think- I would have use for them. I did not write for them. I didn't tell him (my brother) this suit was going on; he knew all about it. I did not send for him. I did not write for him to come, for I knew that he knew about it and that he couldn't be of any advantage to me, and I knew that he couldn't afford to come.

70 No, sir; I was not afraid of his coming out here, but wired him because I thought if he did come out here there might be some unpleasant things between him and the boys, and I preferred that he should not come. Yes; I knew that he couldn't very well leave his business, because I knew what his business was, and I knew it required his attention there and he couldn't afford to come out here. Well, I knew he could be of no advantage to me, and I wired him not to come.

I don't know when I wired him. I don't know the time of the month. I supposed he would wait until the 27th, *of* and if he wasn't here by the 27th they would proceed at once to get out the divorce suit. I couldn't tell, but I think I wired him, but I think it was previous to that time.

I couldn't tell you. I think that the letter stated that if you are not here by the 27th we will proceed at once for a divorce against Mrs. Simms. To avoid his coming—I knew that he was not well, and that his business was such that he couldn't leave—I wired him not to come. I knew that Mr. Evans had written the letter, because I received it from my brother, and he received it from him.

Q. When did you receive it?

A. I don't know. Mr. Simms told me. He came back on Sunday night, and he said, "If you want to sell your whole property, you can use my plat." That was my understanding, and
71 I said, I think that is very kind of you, or something like that; so on the next morning he invited me—and this was the first invitation I had received from him to take a drive for many a day—and he asked me if I would drive down and see Major Evans,

and see about selling the property, and he said, "When are you going to bring this divorce suit against me?" Well, I felt very lonely at that time, having no relatives anywhere about me, and I said I would like to have my brother with me at that time. Very well, he said, I will see Mr. Evans tomorrow morning. Well, I was going to see him myself, and I asked him what Mr. Evans he meant, if it was the Mr. Evans who is here, and I said I had referred to Major Evans, and then he said, "All right, I will come down." So I said, All right, I will go with you, and I went to see him, and he said, If you have anything to say from Major Evans I would like to know it, for if he is not here by the 27th of the month (referring to my brother) I will proceed with the divorce suit. I then said, I have been expecting you to do it for a long time from the cruel statements that have come to me—that is, from his treatment of me.

Yes; he was expecting me to bring a suit against him under the circumstances. They were such that he was expecting me to bring the suit. We were not living together at that time very
72 happily. For some time this continued—this unhappy state of affairs—I cannot tell how long, but whenever I have spoken of certain subjects and certain wrongs that I felt had been done me these occasions would recur.

I cannot tell how long this continued—it has not been so ever since we were married—about this third party.

No, sir; there is no woman in it. The only trouble is that they have tried to injure my reputation—his sons have. The only trouble is that they have tried to injure my reputation, and whenever I would speak of it he would say, Damn it, don't you speak or mention my boys to me.

I do not refer to all of the boys; no, sir; Frank is an honorable boy. I have raised that boy, and he is a boy to be proud of, but there was a report started by another boy, the one that died; he is the one that started the report. Yes; he gave Mr. Millay the information, and Mrs. Millay she has gone about and interfered and circulated the report, and from that it has been brought about.

I have been to Baltimore several times. He (the son) died, the year I went to Baltimore, in Mexico. Yes; he had left here long before that.

We had been on the ranch only three weeks when his father and he had a contention about a horse and he left the house and went away.

Yes, sir; when I have spoken of third parties (I mean there are several third parties) that have made trouble.

73 Yes; a part of the time the boys lived with the family, ever since we went to live on the ranch; they ate at the same table with us until the son was married, and he took his supper with me the night of the 14th of December, 1893; that is the last meal they ate with me. I refer to George, and the supper was mixed up with curses and disrespectful talk all through it. His sons were there and being supported by Mr. Simms. I couldn't tell you much about the running of the ranch. They were not irrigating the

ranch; no, sir; he had a Mexican there to attend to that work, but perhaps there was times when they went out and did some little work; they generally went to town, but they may have went out a little while with the shovel, just for a short time. He was supporting them all of this time. Yes; they came here before I went onto the ranch and they lived in the lumber-rooms—that is, the wooden part; the other part was adobe. Nobody lived in the house when I went there; it was vacant; if it had been so I wouldn't have gone there. They had all an apartment in the lumber part of the house.

I have seen these letters; I certainly did (handing letter to witness, Defendant's Exhibit 1); I signed it in my house; my attorneys brought it to me, Mr. Israel and Mr. Williams; we consulted and they prepared it for me.

74 Redirect examination.

By Judge KIBBEY:

That letter expresses my sentiments, and did at the time it was written. I meant just what is stated therein. I noticed that the letter addressed to me by Mr. Simms was typewritten. He never addressed me so before.

Mr. Simms, when he married me, had not one cent except borrowed money. He borrowed $100.00 from his daughter. My home since marriage has principally been upon the ranch. I have lived in Albuquerque, El Paso, and Colorado, but principally in New Mexico and Arizona. Mr. Simms was a railroad contractor, and was so engaged when I married him. At these various places and others—we were changing about all of the time. I have followed him from one camp to another, wherever his business called him.

I own property; yes. I have a ¼ section of land and am interested in the homestead. The quarter section is north of the homestead. It is incumbered for $8,500.00. The first $2,000 my husband asked me to take out to support myself with; he received $400.00 of it. There is $2,000 that he took out expressly for himself. I have supported myself since the separation; have had to put a mortgage upon my place to do so. He has contributed not a
75 copper. The relations between us were not pleasant up to the time of our separation; for how long I cannot tell. It was the same old thing when I would go out. I would hear these reports and of their talking and he wouldn't investigate it or prevent it in any way.

In reference to money matters, I could never get any money. He wouldn't support me. The trip east was one of mutual pleasure. He returned first, I later. He returned when his son was shot.

The suit against my husband I brought after our separation. I have never brought any other suit. The home place is situated on Center street. There are a few houses built from here out there, and several beyond. It is building up rapidly now.

Recross-examination:

Yes; the suit I spoke of is the only suit I ever brought—February 6th, 1894. You can confuse me on dates, and I am not responsible, for I am no hand to remember dates. I remember the suit; it was the only one. I am not good on dates.

Yes; the dates when I let my husband have money—I got *to* those dates from Mr. Evans (J. W. Evans). He kept a memorandum of all my transactions. My check book shows when I let him have the money back in the East, and that is the way I remember it. I never threatened to sue him at other times; no, not in Albuquerque. No, never.

76 That note remained there until I was leaving there without one cent of money. After he left me, on the 14th of December, 1893, I was without one copper and I had to borrow from Mr. Thomas to get bread to eat.

No, sir; I didn't threaten to sue him on the A. & P. R. R. Our relations were such that I would have considered it an insult to my husband at that time to have sued him.

Yes, sir; I wouldn't have married him if I hadn't loved him. I loved my husband on the 14th of December, 1893. It nearly broke my heart to have him treat me as he did. Notwithstanding his treatment, I would rather have suffered death than have him treat me so in leaving me. I did not go to the Lemon hotel, because I knew that his going there was not in good faith. It was just to get me out of the home place and then he would have left me there in a few days without one cent, just as he did at the home place.

He treated me in the kindest manner until they came. Yes; I didn't want his children around. He came to me in July and said in a very kind manner, My *my* son is going to bring his wife here to live with us; and I said, Mr. Simms, I object to that. I don't think it is right. Well, he said, G. D., and flew into a rage over it.

Well, I was almost heart-broken over it. I felt that it was our home in our old age, and I knew that there never was one roof large enough to cover two families or two women, and I objected to it.

77 I objected to his bringing the married son there and the wife, but I never objected to the boys. He and I had discussed the question several times before that two women couldn't live well in one house. Well, that was a very nice way of putting it, I must say. No, sir; I didn't want to keep the other woman out. I wanted to stay there because it was my home, and I didn't want to have to give up my home in my old age.

I should think that a young man thirty years old could go and make a home for his wife if he wanted one. I wanted it for myself and husband. We had talked it over so many times how we would have a pleasant home for ourselves in our old age, after camping and moving around so many years, as the necessities of his business had caused us to do, and I supposed it was always to be our home. I was willing to leave the boys there, but I didn't want them to

bring their wives there. I didn't want to live with Mr. Simms' son's wives.

I had always looked upon that as the most desirable place about Phœnix, and I just stayed there because I considered it my home and I had a right to. There was no reason for our moving to the hotel. We were comfortable situated and it was our home. I thought I knew his object in getting me down to the hotel. I didn't want to give up my claim to the homestead.

78 Q. But you were perfectly willing to sell it if you had the money, were you not?

By Judge KIBBEY: You need not answer that question.

By Mr. AINSWORTH:

Q. If the place was sold and you could get the money you would take it, wouldn't you?

By Mr. EVANS: If the place was sold, what you call the homestead, and you could get the money you would consent to the sale, wouldn't you?

By Judge KIBBEY: We object to that.

A. I wouldn't think I would have to answer that question.

By Mr. EVANS: Didn't you make a proposition to that effect, if we would pay you ½ of the price of the homestead that you would take it and sign the deed?

By Mr. BENNETT: We object to that.

A. I think there was something in reference to that, in regard to a compromise, whether or not we would go into court with this case, but I couldn't understand all of it, but I was willing to compromise everything rather than to go into court.

I have not spoken to my husband since the separation.

Can't remember any one coming to me with a proposition to sign a deed for the property. I don't know anything about it. If any one came to me I cannot remember it.

79 My place is north of the home place. It is my ¼ section of land; don't know the description of it. It is north of our home place. There is $8,500.00 indebtedness against it in mortgages; there are four. Mr. Wolfe holds one for $2,000. I got the money. My husband borrowed $400.00 of it, I think. I had to pay the board bills in Baltimore.

I sued him to recover that money. The second mortgage I will have to think about—$2,000.00. The third mortgage was for $2,500; the fourth for $2,000. The last $4,500 I obtained since December 14th, 1893.

This ¼ section was given to me by my husband free of encumbrances. He gave it to me so I would be secure in case of his death. I had a ½ section and deeded ½ of it back to my husband—that is, the S. E. ¼—about the time he made his will. He insisted on my giving him this ¼ back, and for the sake of peace I consented.

The will was not submitted to me. Well, at that time I had been

sick and was very nervous and couldn't tell much about it, for I could scarcely write my name. I knew the contents of the will.

The whole matter was talked over at the time as to what I was to have. That was before me trip to Baltimore. He was sick when I returned at the Lemon hotel. I don't know whether he had
80 been sick before that or not. I know we took little trips together in the summer time. We went to Coronado beach; didn't say I wanted these matters settled up beforehand. Perhaps I did come to your (Ainsworth's) office on two different times and on two different days; don't remember going over the matter with Drew. I remember about my being sick, but not about his being sick. Well, as for that I don't know when he was not troubled with his head. I think it was on account of overwork. He was under Dr. Hammond's care for a long time.

Redirect examination.

By Judge KIBBEY:

After the deed to my quarter section was made we lived together a number of years. It was not made in contemplation of separation. If he had it in his mind I didn't know it. Mr. Simms received the income from it. He paid the taxes.

The interest on the mortgages, I suppose he paid the interest on the one he had the money for. At the time of his conveyance to me of the ¼ section of land he said, If you will accept this ¼ you can have that quarter as a dower right and I will pay all of the expenses just the same from now on. It was such a singular question that I asked him, "Do you intend to support me?" and he said, "Mrs. Simms, I am indignant at your asking me such a question; you know I will pay all expenses." In my suit against him he pleaded the statute of limitation.

81 Recross-examination.

By Mr. EVANS:

Q. (Handing written instrument to witness.) Is that your signature?

A. It looks like it.

Q. Is it yours?

A. It looks very like it. I will take it for mine.

By Mr. EVANS: We will have this identified.

(Same was then duly marked Plaintiff's "Exhibit B.")

PLAINTIFF'S EXHIBIT B.

Know all men by these presents: That I, Hannah T. Simms of the county of Maricopa Territory of Arizona, party of the first part and James T. Simms, party of the second part witnesseth: That for and in consideration of the conveyance to me by my said husband of the southwest quarter (¼) of section 32 (32) township two (2) north,

range three (3) east, Gila and Salt River base and meridian, in Maricopa county and Territory of Arizona, and for other good and valuable considerations given to me by my said husband James T. Simms, I do, for myself and my heirs, executors, administrators and assigns, hereby release, set over, transfer and assign to my said husband James T. Simms, his heirs, legatees, devisees, executors, administrators or assigns, all my right title, interest or estate, either real, contingent or expectant and of every nature and de-
82 scription whatsoever, in and to the property which my said husband James T. Simms may now own or possess, or which he may hereafter acquire during his lifetime, intending and meaning that my said husband James T. Simms, shall have the right to will or dispose of all his property as he may see fit, free and clear of any dower, community or other interest which I might have in my husband's said property were this instrument not made and executed.

In witness whereof I have hereunto set my hand and seal this 10th day of June, A. D. 1889.

HANNAH T. SIMMS. [SEAL.]

In presence of—
C. F. AINSWORTH.

Miss BESSIE BUFORD, being sworn for defendant, testified as follows:

By Judge KIBBEY:

Reside north of town; know Mr. and Mrs. Simms; knew Mrs. Simms since December 14th, 1893; have been introduced to Mr. Simms; was at Mrs. Simms' on the 18th of December, when Mr. Simms delivered a paper to her. We were taking lunch together, when Mr. Simms came in with two gentlemen. He went to where Mrs. Simms was sitting and handed her a paper, saying, Read that and give me your answer. She said, I cannot answer it now.
83 He said, Read it and answer it. She said, No; I cannot without consulting my attorney. She asked Mrs. Fridell to take it to her attorney for a reply, which she did. Mrs. Simms would not read the paper handed to her. When Mrs. Fridell returned she replied, saying, I will not go to the Lemon hotel with you. He addressed no one else in the room. Mrs. Simms has resided continuously at the same place since then. In about 15 minutes Mr. Simms returned with two Mexicans to remove the furniture, and they assisted in its removal. He took everything. He said, I have removed everything from the kitchen and the pantry and will leave nothing here.

Mrs. Simms asked him to leave the stove, saying she had no way to prepare her meals and no money to buy one with. He said, I have need of these things; you have money and your credit is better than mine. Mr. Simms was present and superintended the proceeding. The articles were removed to another part of the house, occupied by his sons.

Cross-examination.

By Mr. EVANS:

I read the notice served on Mrs. Simms. I took it from the table when she laid it down. I was sitting at one end of the table and she was sitting at the other end. I was in the room all of the time. I went to the house to stay with Mrs. Simms at her request. She talked to me about her troubles; that
84 Mr. Simms had asked her to go to the Lemon hotel. She said that she wouldn't go to the hotel, but would go any place else. This was the first time I had had any talk with her about it. I had been introduced to her the day before.

I was there as a companion; I was not employed; I expected to remain there that night or for a short time; I didn't know how much longer. When I got to the house she was crying; I don't know what she did say.

There was present on the 18th of December, 1893, Mrs. Fridell, Mrs. Donnelly and daughter, Mrs. Simms, and myself. We were talking about the matter for sure—that was the only subject of conversation—about Mr. Simms leaving her.

Mrs. J. A. LOUNT, being duly sworn, was examined, and testified on the part of the defendant as follows:

My name is Julia A. Lount; I reside in Phœnix; lived here 16 years. I know Mrs. Simms, the defendant; known her 10 years. I know the plaintiff. I know where they have lived, on Center street, north of town. I have known them as well as any of their neighbors; I would say intimately.

Have always been on the best of terms. I was present on the 14th of December, 1893, at their place, north of town. I was there to lunch. We all took lunch together.

Mr. Simms told her that he wanted her to go to the Lemon
85 hotel to live. He said to her, I want you to get ready to go to the Lemon hotel tonight. She told him she couldn't go down there that night; that she had her trunk and other things to attend to. She told him she could not be ready by night. She said she had other things to attend to besides packing her truck; that there were other things she had to see to before she could go.

I asked what was the trouble about. I said, Mr. Simms, what is the trouble about; can't it be settled? He said, No; never. It is my wife's intense hatred of my children. This conversation was had before he left the place; it was one or two days before. I told him that his children had been hateful to her and had talked about her. He then got very indignant and would not listen to anything I said. His manner was not very pleasant. I suppose it might have been a matter-of-fact business with him; he was very stern; yes; I would say that he was very angry.

Cross-examination.

By Mr. EVANS:

I have known Mr. and Mrs. Simms 10 years; the acquaintance

has always been friendly; have visited there. I think they lived at the home place, excepting when they came back from the East they stopped at the Lemon hotel a few weeks.

They lived in Mrs. Tweed's house a short time in the fall of 1892 or 1893. I think they lived in the Kellner house at one
86 time; they put their things in the Kellner house before they started East. They closed out their things from the ranch house; it must have been in the summer of 1888 or 1889; somewhere there. I think it was in 1889. As to her selling the furniture, I wasn't here at that particular time; I was in Prescott; that was in 1889. Yes; they lived in the Kellner house until they went away.

Mr. FRANK PECK, sworn on behalf of defendant, testified as follows:

By Mr. BENNETT:

I reside in Phœnix, Arizona; am in the real-estate business; am acquainted to some extent with real-estate values in and about Phœnix. It is my business to know values.

I know the N. W. ¼ of section 5, north of Phœnix, on which the Simms place is situated. I know the Simms addition to Phœnix.

I have lived here 6 years; was clerk of the board of supervisors four years; have only been in the real-estate business since the first of this year. I was *ex officio* — of the county board of equalization and had to do with the tax-rolls of the county for four years less two months. It is in my line of business to know values. I think the land is worth $500 per acre.

The land in Simms' addition, the lots being 100 by 200, probably the land is worth $1,000 per acre.

87 The southwest quarter of section 32, north of the N. W. ¼ of section 5, I think, probably, on an average, is worth $300.00 per acre; the S. E. ¼ of 32 probably worth $225 to $250 per acre. The N. E. ¼ of section 5, I think, is worth $500 per acre. I don't know as it could be sold for that, but I think it is worth that, and will be worth a good deal more than that.

Cross-examination.

By Mr. AINSWORTH:

I know the Simms house on Center street. Well, if the lot is 100 by 200 I don't know. I have not been in the house. It is probably worth $500 per lot; maybe the corner is worth a little more. I think they are selling at from $900 to $1,000. I put a conservative value upon the tract as a whole. The west half of the ¼ is worth $500 per acre clear over to the Black Cañon road; yes.

The 20 acres that I put at $500 per acre is the north 20 of the S. E. ¼. At the home place the house might be worth $2,000, and it might not be worth over $1,500. I don't know anything about its cost or value.

I don't know any land that has been sold in that locality for that

value lately. I know of no acreage being sold for that amount in that ¼ section. I know of no offers being made for it. I don't know what the owner holds it at. I don't know what he has
88 offered to sell it at. I know of no acreage property that has been sold or offered for sale. I have not kept track of the transfers on that property. I know of none on the east or west side of Central avenue being sold for that. I am basing my values on that sold this side of that and the values in and about Phœnix and the value of land beyond there.

None of this land has been sold at the figures at which I have placed it; no, sir. It might be worth $500 — acre and it might be worth $1,000 per acre. I know of no property being sold. The land on the east side of Central avenue has been tied up for some time and I don't know any that has been on the market.

Property on the east side of Center street is not worth as much as on the other side. I don't think the demand for property is as great. I don't know as the land in Central place has any market value. I would not give $500 for it in the present condition of the title. I was figuring that the title was all straight.

T. E. DALTON, being sworn for defendant, testified as follows:

By Mr. BENNETT:

I reside in Phœnix; lived here 7½ years. I have been a school teacher. The last two years I have been in the real-estate and insurance business. I am in the stationery business now. I
89 am somewhat acquainted with the value of real estate around Phœnix. From my experience I think I know the value of property. I know the N. W. ¼ of section 5. I would say it is worth $500 per acre. The 20 acres in Simms' addition, a fair valuation, would be $400 to $500 per lot. The lots are 100 by 200; there are three to an acre. The 20 acres immediately north of it would be about the same value; not quite so much. There would not be much difference in the value of the two tracts.

The S. W. ¼ of section 32, lying north of Simms' addition, I would say is worth from $250 to 300 per acre. Across Central avenue, the quarter section east, I would consider it of the same value, about. The N. E. ¼ of section 5, east, across Central avenue, east of the ¼ upon which the Simms house is located. I value at $500 to $600 per acre.

If you talk about the market value, you cannot get that for it; you cannot sell these pieces of property for any such prices today. If offered for sale, you could not get a buyer.

Cross-examination.

By Mr. AINSWORTH:

No property has been sold in that vicinity for that price. It may in not many years to come. There was some sold beyond that for $250 per acre. In Mr. Thomas' ¼ some was sold for $200, facing on Centre street. General Sampson holds his at that price—
90 $250.00 per acre. He paid $162.50 per acre two years ago. None has been sold for that figure since. None has been sold

on the Black Cañon road at that price nor on the Cave Creek road nor on Center street out of these quarters.

Mr. Simms sold some lots on Center street; they are worth from $500 to $600 per lot. There hasn't any of them been selling for much more than that around there.

All of those lots in the 20-acre patch I would average at that. Those on the corner this way would be worth perhaps a few hundred dollars more; probably $1,000. I would average them from $500 to $600 per lot, all ofer the 20 acres. I don't know of any land being sold at that figure. I think I offered Mr. Simms $2,100 for the N. W. 10 acres of the S. E. ¼ of section 32, fronting on Center street. He asked $2,500; he held it at $3,000. This was in consideration of Mr. Creighton putting a building on it. There is none selling at that price now. Central place is worth, I think, about as much as the other, from $500 to $600 per acre, averaging the whole quarter—that is, if the title is good. I wouldn't give anything for it as it is.

Redirect examination.

By Mr. BENNETT:

I think the values as given are correct. I think so.

Defendants rest-.

91 That is our case, with the exception of the introduction of the declarations of homestead. We have copies, but they are not certified. We will have them certified to and then place them on the record; they may be considered as offered in evidence now.

By Mr. EVANS: You will understand that they are admitted subject to our objections—that is, that they are not proper, and incompetent.

By Mr. BENNETT: Yes; that they are subject to the legal objections as to relevancy and competency.

(Same, being marked as defendant's exhibits, are heretofore attached.)

Defendant rests.

By Mr. EVANS: Plaintiff now offers the lease identified as Plaintiff's Exhibit B. (See exhibit.)

By Mr. BENNETT: We object to the introduction of that release as immaterial, irrelevant and incompetent, not cross-examination, and all the other objections we can think of.

Plaintiff's Rebuttal.

Mr. J. T. SIMMS, being recalled.

By Mr. EVANS:

I am acquainted with the value of real estate in and about Simms' addition; have some knowledge of the values out there. The value

of the home place—a sale of it was made for $7,500, but never
92 perfected. It includes about one acre. The improvements cost about $5,000. It is difficult to make a statement about a piece of property unless it has been sold. I could probably fix a price as well as anybody, and that would be at what I have been offering it at. I have been offering it at $7,500, and a sale was made a year ago at that price. I would sell it for less money today, for I need money. I consider the place worth at least $6,000.

That is lot one, block one, in Simms' addition to the city of Phœnix; Simms' addition is the S. E. corner of the N. W. ¼ of section 5; it is on the extreme corner.

There is 36 acres in the addition.

Cross-examination:

There is not quite an acre in lot one; it is 174 by 200 feet. I estimate it at $6,000, with the improvements.

Witness excused.

Adjournment taken to call of the referee.

PHŒNIX, ARIZONA, *June 12th*, 1895.

Counsel for the respective parties having set this time, 2.00 o'clock p. m. of this date, and appointed the place of Kibbey & Israel's office for considering the matter of taking further testimony on the
93 part of plaintiff, there appeared before me C. H. Holmes, referee; J. T. Simms, plaintiff, and C. F. Ainsworth, Esqr., of counsel for plaintiff, and Messrs. Kibbey & Israel, by J. H. Kibbey, and Millay — Bennet, by Walter Bennett, counsel for defendant.

C. F. Ainsworth, Esqr., offered to introduce evidence on the part of plaintiff in further support of the allegations of complaint; whereupon Judge Kibbey, of counsel for defendant, objected to the taking of any further evidence at all in this case on the grounds that the case had been closed.

By consent of counsel for both parties the further taking of testimony in this case is continued till Monday, June 17, at 2.00 p. m.

Office of Kibbey & Israel, Cotton block.

PHŒNIX, A. T., *June 17th*, 1895—2.00 p. m.

Plaintiff present in person and represented by counsel, Mr. C. F. Ainsworth and Judge Jos. Campbell, and the defendant being represented by her attorneys, Judge Kibbey and Walter Bennett, Esqr., the following proceedings were had:

By Mr. AINSWORTH: We will call Mr. J. T. Simms, plaintiff.

By Mr. BENNETT: We want to enter a formal objection to the taking of any more testimony in this case for the reason that the plaintiff has already closed his case.

By Mr. AINSWORTH:

That property I had when married to Mrs. Simms. I was
94 engaged in contracting and had a ½ interest in a large quarry, with all the tools and masonry on hand for a bridge on the Kentucky. The contract in that work amounted to $108,000.00. It was the high bridge across the Kentucky river at Point Burnside—the high bridge near Nicholasville, Ky. I had a variety of other small contracts. I considered that I was worth about $40,000 at that time, and I so estimated it at that time.

Q. Mrs. Simms, in her testimony—as I recall it—said when she asked you for money that you wouldn't give her any for her support and the necessaries of life. How is that?

By Judge KIBBEY: You have been all over that once.

By Mr. AINSWORTH: Well, this plaintiff couldn't hear the testimony of the defendant until he read it as produced by the referee, and I think it no more than fair that he has a chance to rebut that part.

Q. Go ahead, state what you have given her in a general way.

A. Whenever I had money I gave it to her as free as water. Many times when she would ask me for $10.00 I would give her $50. That was a very common thing for me to do in those days (producing check). There are some checks and the draft that I gave her. That is one that I gave her when she was East and when she was visiting her folks. There are a few that I find out of the many
that I gave her. The most of the late checks were in evi-
95 dence in the other suit between us and they are in court now.

By Mr. AINSWORTH: We will offer these checks and drafts in evidence in this case (checks of June 27th, 1881, and Oct. 26th, 1883, and June 24th, 1883), heretofore attached.

I have a book here and some stubs in 1883, showing what she got; have none in the last two or three years. My cash books have disappeared that I kept the cash accounts in. There were some of these filed in the court here last year that were late ones.

She drew the money on those checks and drafts that you have there. The draft was sent by my instructions to her by the Central bank and it is marked or stamped paid. It was sent to her at Baltimore. She was the only one I had any occasion to send money to. What I gave her in the last two or three years, my check books and memorandum were filed in the other case a year ago.

There is a stub of a check that I gave her, $200.00, in 1883. That was for her diamond ring, the one she wears at this time. There is also a check for $250 for a horse I gave her in 1884. Here is also a check book that she kept in Prescott, in 1882.

By Mr. BENNETT: Defendants object to the introduction of the checks for the reason that they are immaterial and irrelevant and

relate to transactions that occurred some 12 or 14 years ago
96 and before any of the acts charged in the complaint and before the commencement of this suit.

(Witness continuing): There is the stubs of two checks that I gave her in San Francisco, one for $50.00 and one for $500.00. I have paid all of her bills. I have not given her much money of late years for the reason that I didn't have much to give, but she did not starve or want for anything.

She is as well dressed as any woman and as well provided for at home, but I was hard up at times, but you can see that when I had money I gave it to her as free as water.

Cross-examination:

In 1881, as near as I can recollect, when I came to the Territory, I was worth about $25,000 or $30,000. It consisted of money and a railroad outfit. I was busted—flat broke since my marriage.

Case submitted.

PLAINTIFF'S EXHIBIT A.

PHŒNIX, ARIZONA, *December* 18*th*, 1893.

I now demand that you do come and live with me at the place I have provided for us both, at the Lemon hotel, and that all matters and differences heretofore existing between us be forgotten.

JAMES T. SIMMS.

To Mrs. H. T. Simms.

We hereby certify that we witnessed the delivery to Mrs. H. T. Simms — the original of which the foregoing is a copy, dated
97 this 18th of December, 1893.

A. BARRY.
E. METCALF.

PLAINTIFF'S EXHIBIT B.

Know all men by these presents: That I, Hannah T. Simms, the wife of James T. Simms, of the county of Maricopa and Territory of Arizona, party of the first part, and the said James T. Simms, party of the second part, witnesseth: That for and in consideration of the conveyance to me by my said husband of the southwest ¼ of section thirty-two (32), township two (2) north, range three (3) east, Gila and Salt River base and meridian, in Maricopa county and — Territory, and for other good and valuable considerations given to me by my said husband, James T. Simms, I do for myself and my heirs, executors, administrators and assigns, hereby release, set over, transfer and assign to my said husband James T. Simms his heirs, legatees, devizees, executors, administrators or assigns, all my right, title, interest or estate, either real contingent or expectant, and of every nature and description whatever, in and to the property which my said husband James T. Simms may now own or possess, or which he may hereafter acquire during his lifetime, intend-

ing and meaning that my said husband James T. Simms, shall have the right to will or dispose of all his property as he may see fit, free and clear of any dower, community or other interest,
98 which I might have in my husband's said property were this instrument not made and executed.

In witness whereof I have hereunto set my hand and seal this 10th day of June, A. D. 1889.

HANNAH T. SIMMS. [SEAL.]

In presence of—
C. F. AINSWORTH.

Checks.

No. 505. PRESCOTT, A. T., *July 27th*, 1881.

The Bank of Arizona pay to self for dr'ft Mrs. J. T. S. or bearer two hundred dollars, $200.

J. T. SIMMS.

No. 513. PRESCOTT, A. T., *Oct. 26th*, 1881.

F. W. Blake pay to ——, draft Mrs. J. T. S., or bearer, one hundred $\frac{75}{100}$ dollars.
$100.75. J. T. SIMMS.

No. A 143. ALBUQUERQUE, N. M., *Mar. 28th*, 1883.

The Central bank pay to Mrs. J. T. Simms or order two hundred dollars, $200.

J. T. SIMMS.

99 No. 537. ALBUQUERQUE, N. M., *June 4th*, 1883.

The Central bank pay to Mrs. J. T. Simms or order one hundred dollars, $100.00.

J. T. SIMMS.

DEFENDANT'S EXHIBIT 1.

PHŒNIX, ARIZONA, *December 18th*, 1893.

Hon. James T. Simms, Lemon hotel, Phœnix.

MY DEAR HUSBAND: It is with surprise that I have read your letter of today to me. Let me quote it in full: "Phœnix, Arizona, December 18th, 1893. I now demand that you do come and live with me at the place I have provided for us both at the Lemon hotel, and that our matters and differences heretofore existing between us be forgotten. Signed J. T. Simms. To H. T. Simms."

I cannot understand why you should leave our comfortable homestead and reside at the Lemon hotel. You know that the place is cold and gloomy and ill fitted for old folks like ourselves to reside in, especially in the winter time.

I am also informed of the fact, that I believe to be true and which I am certain you cannot know, judging from your request—that is, that that hotel is not, as it is now conducted, a fit or proper
100 place for a respectable woman to reside in. My dear husband, if we did not have a comfortable and convenient home

suitable to us in our old age I would be willing to go most anywhere with you, to reside most anywhere, and all that I would ask would be your love and affection and manifestations of it as I once had.

For you to deliberately leave our home and immure yourself in that hotel is inexplicable to me. Your letter above quoted is equally inexplicable and surely could not eminate from you, but must have been written in the dictation of some one who wants to place me in a false light and for some purpose that can bode neither of us any good.

And in this connection let me say that I am grieved and hurt almost beyond measure by the further fact that I am informed by Mr. Trask, the groceryman, by the employees of Mr. Hurley, the butcher, that you have given orders to them not to allow any further purchases of food or supplies for the house, my home and yours, to be made by me or my order upon your account or to your credit.

How do you expect me to live? The milkman has stopped leaving milk. Am I to presume that you have given him similar orders? If you are angered simply because I object to your sons and your son's family taking possession of our home and we being obliged in our old age to vacate that home and take up our abode at lodging-houses and hotels upon that account, then surely you are unjust to me.

101 So far as our matters and differences existing (to use the language of your letter) are concerned, I fail to comprehend your meaning. There can be none upon my part, and are none aside from my desire to reside uninterruptedly with you in our home and to preserve our property from incumbrance, and to have paid to me what is justly mine, so that I may not be without means in the last days of my old age.

My affection for you is now as it has always been, and it does seem strange that while I have always been and am willing to forgive and forget past indignities and cruel treatment, and to abide with you until death do us part, that you should persist in doing things that you know can but cause me heartaches and mental anguish.

Let me say, in conclusion, come home to the homestead, and let us live there surrounded by our home comforts as we should live and as I wish to live; and don't let your love for your boys, who are young and vigorous and able to take care of themselves, drive me from the home of my old age.

Your affectionate wife, HANNAH T. SIMMS.

DEFENDANT'S EXHIBIT 2.

J. T. SIMMS,
PHŒNIX, ARIZONA, *September 2nd*, 1893.

Wm. H. Dryden, Esqr., Baltimore, Md.

102 DEAR BROTHER: I understand that you are about to make a visit to Arizona. Will you be kind enough to let me know

by return mail when you expect to be here, inasmuch as I am desirous that you make it a point to come as soon as possible, for your advice and counsel is sadly needed out here by certain parties.

Your brother, J. T. SIMMS.

DEFENDANT'S EXHIBIT 3.

Pierce Evans, attorney-at-law.

PHŒNIX, ARIZONA, *September 15th*, 1893.

W. H. Dryden, Esqr.

DEAR SIR: On the second instant Mr. James T. Simms, of this place, wrote you the following letter: "W. H. Dryden, Esqr. Dear Brother: I understand that you are about to make a visit to Arizona. Will you be kind enough to let me know by return mail when you expect to be here, inasmuch as I am desirous that you make it a point to come as soon as possible, for your advice and counsel are sadly needed by certain parties out here." This morning Mr. Simms received your reply, dated the 9th instant, at Baltimore. The foregoing letter was written by Mr. Simms under the advice of his attorneys and with the object in view
103 of preventing, if possible, a suit being instituted by him against his wife for a divorce.

The trouble is such that I doubt whether or not it can ever be settled. There is always two sides to every question, and it is better that some mediator settle this trouble between the parties, if possible, outside of the courts.

Mr. Simms seems to think and believe that if you were here that an understanding could be reached, for he has great confidence in your judgment.

In view of the existing state of affairs his counsel deems it best to write and urge that you come here as soon as you possibly can.

Yours truly, PIERCE EVANS, *Of Counsel.*

DEFENDANT'S EXHIBIT 4.

Pierce Evans, attorney-at-law.

PHŒNIX, ARIZONA, *Oct. 5th*, 1893.

W. H. Dryden, Esqr.

DEAR SIR: Your letter of the 25th of September at hand, and contents noted with care.

The latter part of your letter calls forth this answer: In reply, will state that I do not deem it my place or at all proper that I should wrote full particulars of the whole affair. I can say
104 this, however, that my letter to you of date September 15th was virtually written in the nature of a summons, that you come here as a "mediator." A long, costly, and vexatious litigation will in all probability be the outgrowth of your failure or refusal to come.

The people who will be the prime movers in that litigation are

too old to indulge in that class of pastime, and it is best that it be avoided, if possible.

Court meets here in November, at which time proceedings will be commenced. Once more I say to you, come here if you can. Should I fail to hear from you by the 25th inst. will take it that you are not coming and shall file the complaint, from which time on you can do nothing further than to advise Mrs. Simms, who, I take it, is fully advised in all things notwithstanding her failure to write to you on the subject.

Yours, &c., PIERCE EVANS.

DEFENDANT'S EXHIBIT 6.

PHŒNIX, ARIZONA, *December 18th*, 1893.

I now demand that you do come and live with me at the place I have provided for us both at the Lemon hotel, and that our matters and differences heretofore existing between us be forgotten.

JAMES T. SIMMS.

105 To Mrs. H. T. Simms.

Know all men by these presents that I, James T. Simms, of Maricopa county, Territory of Arizona, hereby certify and declare that I am a married man and the head of a family, and reside with my said family on the south ½ of the S. E. ¼ of the N. W. ¼ of section 5, tp. 1 N., R. 3 east, Gila and Salt River base and meridian; that it is my intention to occupy and use the above-described land and premises, together with the improvements thereon, as a homestead under and by virtue of the laws of Arizona Territory; that the value of said property claimed as a homestead is four thousand dollars.

JAMES T. SIMMS.

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, James T. Simms, do solemnly swear that I have read the above and foregoing declaration of homestead, and that the matters and things therein stated are true.

JAMES T. SIMMS.

Filed and recorded at the request of J. T. Simms Nov. 1st, A. D. 1887, at *LL*.20 o'clock a. m.

HENRY L. WHARTON,
County Recorder.

106 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. W. Kincaid, county recorder in and for the county of Maricopa and Territory aforesaid, hereby certify that I have compared the foregoing with the original record of a declaration of homestead filed and recorded in my office on the first day of November, 1887, in Book I of Declarations of Homesteads, at page 7, and that the same is a full, true, and correct copy of such original and of the whole thereof.

Witness my hand and seal of office this 26th day of October, 1895.

J. W. KINCAID,
County Recorder.

[SEAL.]

Know all men by these presents that I, James T. Simms, of Maricopa county, Territory of Arizona, hereby certify and declare that I am a married man and the head of a family, and reside with my said family on the south half of the S. E. ¼ of the N. W. ¼ of section 5, tp. 1 N., R. 3 E., Gila and Salt River base and meridian.

That it is my intention to occupy and use the above-described land and premises, together with all of the improvements thereon, as a homestead under and by virtue of the laws of Arizona
107 Territory; that the value of said property claimed as a homestead is four thousand dollars.

JAMES T. SIMMS.

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, James T. Simms, do solemnly swear that I have read the above and foregoing declaration of homestead, and that the matters and things therein stated are true.

JAMES T. SIMMS.

TERRITORY OF ARIZONA, }
County of Maricopa. }

Before me, J. W. Evans, a notary public in and for said county, on this day personally appeared James T. Simms, known to me to be the person whose name is subscribed to the annexed instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 12th day of October, 1888.

J. W. EVANS,
Notary Public.

[SEAL.]

Filed and recorded, at request of J. T. Simms, October 12th, A. D. 1888, at 11.00 o'clock a. m.

HENRY L. WHARTON,
County Recorder.

108 TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

Whereas on the first day of November, 1887, and again on the 12th day of October, 1888, this declarant, Hannah T. Simms, and her husband, James T. Simms, did make and declare a homestead, under the laws of the Territory of Arizona, upon the following-described real estate, to wit, the south ½ of the S. E. ¼ of the N. W. ¼ of section 5, five, in township one (1) north, of range three (3) east, of the Gila and Salt River base and meridian, situated in Maricopa county, Territory of Arizona; and

Whereas I, Hannah T. Simms, did thereafter in an instrument of

writing and conveyance between myself and my said husband, James T. Simms, *did* assign, release, and transfer unto said James T. Simms, his heirs, legatees, devisess, executors, administrators, or assigns, all my right, title, interest, or estate, either real, contingent, or expectant, and of every nature and description whatsoever, in and to the property which my said husband, James T. Simms, may now own or possess or which he may hereafter acquire during his life-time, intending and meaning that my husband, James T. Simms, shall have the right to will or dispose of all his said property as he may see fit, free and clear of every dower community or other interest which I might have in my husband's said property

109 were said instrument not made and executed; and

Whereas in the making, signing, and executing of said instrument it was not my intention to abandon or grant either of said homesteads so before declared; and

Whereas some doubt has been expressed as to the effects of said grants, assignment, release, and transfer hereinbefore recited:

Now, therefore, to whom it may concern: I, Hannah T. Simms, do hereby declare that I am a resident of Maricopa county, Arizona; that I am the wife of the said James T. Simms, and the said James T. Simms is the head of a family in said Maricopa county, of which family I am a member, and I do now by reason of the declaration of homestead heretofore made on the first day of November, 1887, hereinbefore mentioned, claim, and do by this declaration claim, the following-described real estate, to wit:

The south ½ of the southeast ¼ of the northwest ¼ of section 5, five, township one (1) north, of range three (3) east, in Maricopa county, Arizona, as a homestead; that said real estate is of the value of four thousand dollars.

HANNAH T. SIMMS.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Personally appeared before me, George C. Israel, a notary

110 public in and for the said county, this thirtieth day of December, A. D. 1893, the above Hannah T. Simms, who, being by me duly sworn, on her oath says:

That the matters and facts set forth in the foregoing declaration are true of her own knowledge except as to such matters as are therein stated upon information, and those she believes to be true.

G. C. ISRAEL,
Notary Public.

[SEAL.]

Filed and recorded, at the request of G. C. Israel, December 30th, 1893, at 4.40 p. m.

NERI OSBORN,
County Recorder.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. W. Kincaid, county recorder in and for the county aforesaid, hereby certify that I have compared the foregoing copy with the original record of a declaration of homestead filed and recorded in my office on the 30th day of December, 1893, in Book One of Dec-

larations of Homesteads, at page 129, and that the same is a full, true, and correct copy of such original and of the whole thereof.

Witness my hand and seal of office this 26th day of October, 1895. J. W. KINCAID, [SEAL.]
County Recorder.

Defendant's 5.

111 Statement of all real estate purchased and sold by James T. Simms as shown by the records of Maricopa county, Arizona Territory, with mortgage and homestead incumbrances thereon, dated Phœnix, A. T., December 18th, 1894, by the Arizona Abstract Company.

Purchases.

Date.	From whom bo't.	Description.	Consideration.
May 15, 1884	J. F. Meador.....	N. W. ¼ of sec. 5, T. 1 N., R. 3 E.	$12,000.
Jun- 16, "	Sheriff Maricopa Co.....	N. E. ¼ of sec. 5, T. 1.....	2,670.
July 31, "	J. P. Holcomb.....	S. ½ " " 32, " 2 and shares 18 & 24, Mar. Co.	7,000.
Feb. 12, 1887	E. T. Hargrave..... ...	N. W. ¼, sec. 5, tp. 1 N., R. 3 E.	1.
May 26, 1888	Geo. T. Brosius...	Lot 1, bl'k 16, Cent'l place.	600.
Jun- 23, "	Hannah T. Simms.....	S. E. ¼, sec. 32, T. 2 N., R. 3 E.	Love & af- f'n.
May 20, '89	E. J. Edwards.....	Lots 1, 3, 5, bl. 82, city Phx.	4,000.
Jun- 10, '89	Geo. T. Brosius.	N. ½ & S. W. ¼ of sec. 5, tp. 1 N., R. 3 E. (120 A.); also 1, 3, & 4, bl. 20, in Central place.	30,000.
July 17, '89	Wm. H. Dryden.....	N. ½ of S. E. ¼ of N. W. ¼, sec. 5, tp. 1 N., R. 3, 20 acres.	10,000.
Jun- 10, '89	Hannah T. Simms, wf.....	All interest in the property now owned or which he, Simms, may hereafter acquire. * * * (Conveyance of S. W. ¼, sec. 32, T. 2 N., R. 3 E.)	
Jan. 6, '94	Louis Melczar.....	Lots 3 & 4 of bl. 3, Porter & Baxter's subdiv., tr. "B," Murphy's add.	100.
July 7, '94	Rose Gillingham	N. E. ¼ of N. W. ¼ of sec. 23, tp. 2 N., R. 3, sub. to m'tge. $500.	1,000.
112			
May 31, '93	O. H. Christy.....	That pt. of S. E. ¼ of N. W. ¼ of sec. 20, tp. 2 N., R. 3 E., that lies north of Grand canal (20 acres).	2,000.
May 9, '91	Geo. T. Brosius..	N. E. ¼ of sec. 5, tp. 1 N., R. 3 E. (except lots 3 & 4, B. 11; lot 2, B. 18; lot 3, B. 20; lot 3, B. 1; lot 1, B. 1; lot 2, B. 15; lot- 3, 4, 5, B. 17; lot 1, B. 8; lot 3, bl. 16, Central place).	30,000.

Sales.

Date.	To whom sold.	Description.	Consideration.
Oct. 8, '86	Hannah T. Simms.....	S. ½ of sec. 32, T. 2 N., R. 3 E. (320 acres); love and affection and	$1.00
" " "	" " "	S. ½ of sec. 32, T. 2 N., R. 3 E. (320 acres); love and affection; recorded.	Do.
Feb. 28, '87	Geo. T. Brosius.....	N. 2 & S. W. ¼ of N. W. ¼ and N. E. ¼ of sec. 5 N., R. 3 E. (280 acres).	59,000.00
May 2, '87	Wm. H. Dryden.....	N. ½ of S. E. ¼ of N. W. ¼ of sec. 5, tp. 1 N., R. 3 E.	7,000.
May 26, '88	Jas. McCarthy.....	Lot 1, bl. 16, Central place.	600.
Feb. 21, '90	Frank Fuqua.....	Lots 1, 3, 5, block 82, Phx. (subj. to mortgage, $1,620.00).	2,575.
Apr. 22, '93	Robert Wilson.....	Lot 1, block 9, Cent'l place.	600.
Aug. 7, '93	Jas. T. Simms, Jr.....	Lot 13, bl. 2, Simms' ad. to Phœnix.	1.
113			
July 15, '93	Mary M. Lane.....	Lot 1, block 2, Simms' ad. to Phox.	1.00
Aug. 8, '93	Geo. A. Simms.....	Lot 11, block 2, Simms' ad. to Phox.	1.
" "	Mary J. Brosius.....	Lots 12 & 14, block 2, Simms' ad. to Phox.	1.
" "	Chas. F. Simms.....	Lot 12, block 1.....	1.
Jan. 2, '94	Louis Melczar.....	Lot 2, block 2.....	1,000.
Aug. 26, '93	Wm. E. Johnston.....	Lot 5, in bl'k 1.....	750.
M'ch 14, '94	J. T., Jr., & G. A. Simms..	That part of S. E. ¼ of N. W. ¼ of sec. 20, T. 2 N., R. 3 E., lying north of Grand canal.	1,500.
Apr. 6th, 1894	Henry E. Kemp.....	Lot 4, bl'k 5, Central pl.	500.
May 28, '94	C. M. Frazier.....	Lot- 3 & 4, bl'k 2, Simms' ad.	1,650.
Jun- 6th, '94	Goldman & Co.....	Lot 6, bl'k 2, Simms' ad.	1,000.
July 3, 1894	Rose Gillingham.....	Lot 21, bl'k 1, " " .	850.
June 1st, 94	Ancil E. Martin.....	Lot 9, bl'k 2, " " .	850.
Jun- 21st, '94	Geo. H. Keefer.....	Lots 3 & 4, bl'k 3, P. & B.'s subdiv. of tract "B," in Murphy's addition.	500.
Oct. 26, '94	R. H. Faulkner.....	Lot 5, bl'k 2, Simms' ad. to P'x.	1,000.
Dec. 18th, '94	R. Allyn Lewis.....	Lot 2, block 1, Simms' ad. to P'x.	1,500.

Incumbrances (Mortgages Unsatisfied).

In whose favor.	Description of real estate.	Am't secured.
T. N. Pemberton.....	N. ½ of N. W. ¼ of sec. 5, tp. 1 N., R. 3 E....	$7,000.
Wm. E. Thorne.....	N. E. ¼ of N. W. ¼ of sec. 5, tp. 1 N., R. 3 E..	6,000.
114		
Home savings bank...	S. E. ¼ of sec. 32, tp. 2 N., R. 3 E.....	12,000.
N. P. McCallum.....	Lots 15, 17, 19, bl'k 2, Simms' addition.....	500.
Phœnix national bank.	Lots 7, 9, 11, 13, 15, 17, 19, 21, block 3, Simms' add.	1,700.
Edward P. Hayden....	Lots 1, 7, 9, 11, 13, 15, 17, 18, 19, 20, 21, block 1, Simms' add.	3,000.
Maricopa L. & T. Co...	Lots 4 & 6, block 1.....	1,659.32

Homesteads.

When filed.	By whom claimed.	Description.	Value.
Nov. 1st, '87	James T. Simms....	S. ½ of S. E. ¼ of N. W. ¼ of sec. 5, tp. 1 N., R. 3 E.	4,000.
Oct. 12th, '88	James T. Simms....	S. ½ of S. E. ¼ of N. W. ¼ of sec. 5, tp. 1 N., R. 3 E.	4,000.
Dec. 30th, 1893	Hannah T. Simms..	S. ½ of S. E. ¼ of N. W. ¼ of sec. 5, tp. 1 N., R. 3 E.	4,000.

Incumbrances Continued (Mortgages Satisfied).

Date.	To whom given.	Description of realty.	Am't secured.
May 15, '84	J. F. Meador.....	N. W. ¼ of sec. 5, tp. 1 N., R. 3 E.	$9,000.
Feb. 19, '87	Emory L. Grant....	N. W. ¼ sec. 5, tp. 1 N., R. 3 E.	10,000.
Apr. 1st, '89	Mar'pa L. & T. Co..	S. E. ¼ of sec. 32, tp. 2 N., R. 3 E.	8,640.
May 1, '89	Mar. L. & T. Co....	Lots 1, 3, & 5, bl'k 82, Phœnix.	1,620.
115			
Apr. 11th, '91	Maricopa L. & T. Co.	S. E. ¼ sec. 32, tp. 2 N., R. 3 E.	8,640.

JAMES T. SIMMS, *Mortgagee.*

Date.	By whom given.	Description.	Am't secured.
Nov. 26th, 1894	R. H. Faulkner....	L. 5, bl'k 2, Simms' add.....	1,000.

The plaintiff herewith tenders the above statement of facts filed within the term of which the judgment herein was rendered and asks that the same be approved and made part of the record in the cause.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Plaintiff.

We agree to the above statements of facts.
November 23rd, 1896.

J. H. KIBBEY AND
MILLAY & BENNETT,
Att'ys for Def't.

The foregoing statement of facts filed and lodged with me this 13th day of October, 1896.

J. E. WALKER,
Clerk of District Court.
C. H. KNAPP,
Deputy Clerk.

116 The foregoing statement of facts is allowed, settled, and approved and made a part of the record in said cause.

JNO. J. HAWKINS, *Judge.*

Nov. 25th, 1896.

(Endorsed:) Title of the court and cause. Statement of facts.

Title of the Court and Cause.

Be it remembered that on the 2nd day of April, 1896, defendant filed a motion and affidavit for alimony and counsel fees in the words following, to wit:

Comes now the defendant in the above cause, by Kibbey & Williams, Millay & Bennett, and W. H. Barnes, her attorneys, and move the court for an order upon the plaintiff herein, James T. Simms, that the said plaintiff pay the said defendant the sum of five thousand dollars as provisional alimony to enable this defendant to employ counsel and defend the above action.

This motion is made upon the papers on file in this case and the affidavits hereto attached.

BARNES, MILLAY, BENNETT AND KIBBEY,
Attorneys for Defendant.

TERRITORY OF ARIZONA, }
Maricopa County. }

Hannah T. Simms, being first duly sworn, on her oath says
117 that she is the defendant in the above-entitled action and is the wife of the plaintiff, James T. Simms; that this action was commenced in this court on the 6th day of October, 1894; that on the — day of ——, 1895, the Honorable A. C. Baker, judge of this

court, of his own motion, changed the venue in this cause on account of his disqualification to try same, and set the same for hearing before Honorable J. J. Hawkins, judge of the 4th judicial district of this Territory, and that this defendant has not since the commencement of this action had any opportunity until the present time to press a motion for alimony in this cause.

Affiant further says that the plaintiff has not since the commencement of this action, nor for a long time prior thereto, contributed in any manner to the support of affiant.

That affiant has one quarter section of land in Maricopa county, Arizona, and has no other property of any description whatever; that the said quarter section of land is now, and at the time of the commencement of this action was, heavily encumbered; that the same then and now is entirely unproductive and brings affiant no income whatever; that since the commencement of this action this affiant has been compelled to and has still further mortgaged and encumbered said premises in order to pay interest on the former incumberances and the taxes accrued before and since the commencement of this action upon said premises.

118 That affiant is now without means to pay counsel for her defense of this action and is destitute of means for her support, and that affiant is informed and believes that the said quarter section of land is now so heavily encumbered that affiant is unable to raise further money upon the same by way of mortgage or otherwise, and that said premises cannot be sold.

Affiant further says that the plaintiff, James T. Simms, is the owner of a large amount of real estate and other property in said Maricopa county; that said real estate consists of farming lands and city lots, among which is the property known as the "Simms addition to the city of Phœnix," and is the most desirable residence property in said city; that the same is very valuable and is good salable property, and that the said plaintiff has since the commencement of this action sold and received payment for a large number of lots in said addition, amounting, as affiant is informed and believes, to a sum exceeding $75,000.

That said plaintiff has ample means at his disposal and has no family dependent upon him for support, excepting this affiant, and is abundantly able to pay to affiant a reasonable amount for her support and with which to pay counsel for her defense in this action.

HANNAH T. SIMMS.

119 Subscribed and sworn to before me this 2nd day of April, 1896.

J. W. EVANS, [SEAL.]
Notary Public.

That the following affidavits on behalf of the parties were presented, to wit:

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

James T. Simms, being first duly sworn, on oath deposes and says that he is the plaintiff in the above-entitled cause; that he has heard read the affidavit of Hannah T. Simms, made in said action on the 2nd day of April, 1896.

This deponent says that said Hannah T. Simms is and has been for over five years last past tho owner of the southwest quarter of section thirty-two, township two north, range three east; that said quarter section of land was deeded from this deponent to said Hannah T. Simms as her own property and in lieu of all her right, title, and interest in and to any and all other property belonging to this deponent.

Deponent says that at the time he deeded said land to said Hannah T. Simms he verily believed the same was worth the sum of three hundred dollars per acre; that said land ever since has been and is now worth three hundred dollars per acre; that said
120 land is equally productive with any land owned by this plaintiff; that the only reason said Hannah T. Simms does not receive any income from said land is for the reason that she refuses to rent the property or to purchase water to irrigate the same, and that said land is wholly unproductive without irrigation.

That deponent says of his own knowledge that said Hannah T. Simms has always claimed that said land was worth four hundred dollars per acre; that the agent who has said land in charge has repeatedly claimed that they held said land and wo-ld not sell the same for less than three hundred dollars per acre; that said land is, in deponent's judgment, worth the sum of forty-eight thousand dollars; that said deponent is informed, and verily believes to be true, that said land is not mortgaged for more than the sum of eight thousand dollars.

This deponent further says that he has no productive property whatever; that he owns several tracts of land, every foot of which is mortgaged, and that the taxes and interest on the mortgages on said lands—all the lands owned by him—are three times the income derived therefrom.

That this plaintiff owns a portion of what is known as Simms' addition to the city of Phœnix; that said addition is comprised in the plat of thirty-six acres and no more; that the most valuable piece of said Simms' addition is occupied by the said Hannah
121 T. Simms; that since the said Hannah T. Simms deserted this plaintiff, on the 14th day of December, 1893, this deponent has not received from the sale of lots in the said Simms' addition to exceed the sum of six thousand dollars in cash or money or its equivalent; that this deponent has sold several lots at a very low figure for the purpose of inducing people to build thereon, and that all the money derived from the sales of lots in Simms' addition since December, 1893, would not exceed six thousand dollars, all of which has been expended for the payment for improvement and taxes on this property; that this deponent has year by year for the past three

years only been able to pay his taxes and interest by increasing the mortgages on his real estate.

That said Hannah T. Simms is worth today in property more, after paying her debts against the same, than this deponent believes himself to be worth over and above the mortgages and indebtedness that he now owes. This deponent says that said Hannah T. Simms, in his judgment, is worth the sum of thirty thousand dollars over and above her debts and liabilities, and has ample means to support and maintain herself and to pay counsel fees; that deponent knows of his own knowledge that in this suit now pending she has employed six different attorneys; that she has sufficient property and means out of which to pay said attorneys. Deponent says
122 that no application has been made upon him to pay suit-money or alimony until the second day of April, 1896.

JAMES T. SIMMS.

Subscribed and sworn to before me this 4th day of April, 1896.
[SEAL.] A. J. EDWARDS,
Notary Public.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

William S. Pickrell, being first duly sworn, on oath deposes and says that he resides in the city of Phœnix, Arizona; that he is well acquainted with James T. Simms and Hannah T. Simms; that he knows the southwest quarter of section 32, township 2 north of range three east; that said property belongs to the said Hannah T. Simms, as he is advised by the said Hannah T. Simms.

That in the month of November, 1895, he attempted to purchase of the said Hannah T. Simms a portion of said ¼ section, to wit, ten acres, with a frontage on Center street equal to one-half its depth, said land to be taken part of the way up from the southeast corner of said quarter section—that is to say, at least ten acres was to be taken off from the corner before he should have the right to select his piece of ten acres; that he offered said Hannah T. Simms the sum of two hundred and fifty dollars per acre for said
123 & 124 land; that said Hannah T. Simms referred this deponent to her agent, J. W. Evans; that this deponent then consulted the said J. W. Evans, as agent of said Hannah T. Simms, and he was informed by said J. W. Evans that he could not purchase said ten acres for less than three hundred and fifty dollars per acre.

That the said J. W. Evans informed this deponent that said quarter section was held at and they were going to make it bring forty-eight thousand dollars, and that they did not propose to sell it until they realized that price for said quarter section. This deponent says that he was ready and willing and had the money in cash to pay at least two hundred and fifty dollars per acre for ten acres situated anywhere within a reasonable distance from the southeast corner of said quarter section, with a width on Center street of one-half its depth.

W. S. PICKRELL.

Subscribed and sworn to before me this 4th day of April, 1896.
C. F. AINSWORTH,
[SEAL.] *Notary Public.*

TERRITORY OF ARIZONA, }
County of Maricopa. }

James T. Simms, being sworn, deposes and says that he
125 has read the affidavit of Hannah T. Simms of date April 7th, 1896, and that it is not true that affiant made false and spurious promises to said defendant and as averred by her, or that he has in his possession certain water rights properly belonging to the land owned by her and received from affiant, or that he is in the receipt of an income from his property in this county aggregating the sum of $10,000.00 per annum; that his income is no greater than heretofore stated by affiant in his affidavit of April 4th, 1896, and that as heretofore stated, that if the mortgages and liens upon the land belonging to him in said county were settled and paid off that he would be no better off than defendant, and, in truth and in fact, less, and reiterates the fact to be that defendant has means to support herself and pay counsel fees, and that at the time she entered into the contract with affiant in all matters and things in relation to the joint estate of plaintiff and defendant were fully discussed; that defendant well knew affiant was heavily in debt, and that when said indebtedness was paid from his portion of said estate that he would have no more or greater portion of said estate than defendant; that at the time of said division, on the —, defendant refused to stand her share of the same, but insisted that she should receive her share unincumbered, and so accepted the 160 acres confessed as hers, in full satisfaction and as her portion of said
126 estate, and that affiant took the balance, together with the indebtedness.

Affiant avers that it is true that defendant has six counsel employed, to wit, Barnes & Martin, Tucson; Kibbey & Williams, and Millay & Bennett, of Phœnix.

JAMES T. SIMMS.

Subscribed and sworn to before me this 10th day of April, 1896.
[SEAL.] J. B. EARLY,
Notary Public.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

Hannah T. Simms, being first duly sworn, on her oath deposes and says that she has heard read the affidavits of James T. Simms and W. S. Pickrell filed in this cause.

Affiant says that it is true that she is now the owner of the southwest ¼ of section 32, in township 2 north, range three east, but that it is untrue that affiant received this property from James T. Simms as her share of the community property; that the fact is that the said James T. Simms deeded and conveyed to affiant the ¼ section of land above described, and also another quarter section of land

adjoining it and of equal value, making a total of 320 acres
127 of land; that said conveyance was made about 5 years ago, and at that time the said James T. Simms considered the said half section of land to be a reasonable provision to be made for affiant out of his large and valuable property in case of his death; that afterwards, by false and specious promises, among other things to properly care for and support affiant, said James T. Simms induced affiant to reconvey to him one quarter section of said land without any consideration whatever.

Affiant further says that the quarter section of land now owned by her is vacant desert land without improvements of any kind, and that the water rights properly belonging to said land have been taken and are now held by the said James T. Simms; that she has no means whatever with which to purchase water or with which to make improvements upon said premises in order to make it productive, and no water rights upon which to buy water for said land, even if she had the means.

That it is not true that the lands owned by James T. Simms are unimproved or unproductive, but that he has large tracts of land improved and well set in alfalfa and from which he derives large revenues by pasturing horses and other stock thereon; that affiant is informed and believes his income is at least $10,000.00 per annum.

128 Affiant further says that she has heard the affidavit of William S. Pickrell herein; that the ten acres of land referred to in said affidavit was at that time and now is encumbered, together with other property, for an amount greater than the said Pickrell claims to have offered for it; that affiant could not get the incumbrance released, and therefore could not make a clear and unincumbered title.

Affiant further says that the ten acres wanted by Mr. Pickrell, if taken out of the entire tract, would destroy the selling qualities of the large portion of the balance of said premises, and that she was informed and advised, and so believes the fact to be, that the selling of said ten acres would materially injure and detract from the value of said premises.

Affiant further says that the said quarter section of land is now encumbered to the extent of $11,500; that she is unable to sell any portion of it; that she has no income whatever and no means with which to supply herself with the necessaries and ordinary comforts of life; that she has been and now is unable to pay her counsel for their services in this case, and that it is untrue that she has employed six different lawyers in this case.

HANNAH T. SIMMS.

Subscribed and sworn to before me this 7th day of April, 1896.

[SEAL.] JERRY MILLAY,
Notary Public.

129 That upon the — day of June, 1896, upon consideration of the said affidavits and the evidence in the cause, the court

ordered, among other things, that said plaintiff pay to said defendant the snm of $750.00 counsel fees, and the sum of $150.00 per month from December]14th, 1893; to which ruling of the court the plaintiff duly excepted and offered his bill of exceptions therein and asks that it be made a record in the cause.

And be it further remembered that on the — day of June, 1896, and within the time prescribed by law the said plaintiff filed his motion for a new trial in the above-entitled action in the words following, to wit:

Motion for New Trial.

JAMES T. SIMMS, Pl'ff,
vs.
HANNAH T. SIMMS, Def't.

Now comes the plaintiff in the above-entitled action and moves the court to vacate and set aside the judgment rendered in said cause, and to grant plaintiff a new trial therein upon the following grounds, to wit:

I.

Upon the ground that the court erred in admitting and rejecting evidence.

II.

That the judgment of the court is contrary to the law.

130 III.

That the evidence does not sustain the judgment of the court.

IV.

That the defendant should not have been allowed to dismiss her cross-bill in said action against plaintiff's objection.

That thereafter, on the — day of ——, 1896, the said motion was by the court overruled; to which ruling the plaintiff duly excepted, and presents this bill of exceptions therefor.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Plaintiff.

The foregoing bill of exceptions filed and lodged with me this 13th day of October, 1896.

J. E. WALKER,
Clerk Dist. Court,
By C. H. KNAPP,
Deputy Clerk.

We have examined this bill of exceptions and have no objections to its recitals.

MILLAY & BENNETT,
JOS. H. KIBBEY, *For Def't.*

Nov. 23rd, 1896.

The foregoing bill of exceptions is approved, settled, and
131 allowed, and is hereby made a part of the record of said cause.

JNO. J. HAWKINS, *Judge.*

Nov. 25th, 1896.

(Endorsed:) Title of the court and cause. Plaintiff's bill of exceptions. No. 2083.

(Endorsed:) (Bill of exceptions and statement of facts.)

Minute Entries.

NOV. 30TH, 1894.

Title of the Court and Cause.

This cause is set for trial Tuesday, December 4th, 1894.

DEC. 4TH, 1894.

Title of the Court and Cause.

By consent of all the parties the trial of this cause is continued for a time to be hereafter fixed by the court.

DEC. 31ST, 1894.

On motion of counsel it is ordered that this case be tried before Judge Jno. J. Hawkins in this county.

FEB. 11TH, 1895.

Title of the Court and Cause.

Ordered that this cause be set for trial on Wednesday, March 6th, 1895.

MARCH 18TH, 1895.

Title of the Court and Cause.

This cause set for trial Friday, March 22nd, 1895.

APRIL 3RD, 1895.

Title of the Court and Cause.

It is ordered on motion of the attorneys for the plaintiff,
132 the attorneys for defendant consenting thereto, that C. H. Holmes, court reporter, be, and he is hereby, appointed referee to take the testimony in said action and report the same to Hon. J. J. Hawkins, judge of the 4th judicial district of the Territory of Arizona, for consideration and judgment.

JANUARY 18TH, 1896.

Title of the Court and Cause.

It is ordered by the court that the above cause be set for argument on Tuesday, January 28th, 1896.

JANUARY 27TH, 1896.

Title of the Court and Cause.

It is ordered that the argument in this cause be reset for hearing on Tuesday, February 4th, 1896.

JUNE 29TH, 1896.

Title of the Court and Cause.

The motion for a new trial in the above-entitled cause heretofore filed in said action having been by me duly considered, it is ordered, adjudged, and decreed that said motion be, and the same is hereby, overruled.

(Signed) J. J. HAWKINS, *Judge.*

Minute Entry under Same Date.

Counsel in this cause gives notice of appeal from the judgment and order overruling the motion for a new trial to the supreme court of the Territory of Arizona.

Title of the Court and Cause.

Minute Entry.

SATURDAY, *Nov. 21st*, 1896.

The May term of this court stands adjourned *sine die.*

A. C. BAKER, *Judge.*

132½ Title of the Court and Cause.

Entry for Clerk.

This cause having heretofore come on for hearing, and having been referred to a referee, and the testimony therein having been taken, and afterwards the same having been argued to the court by counsel for respective parties hereto, and the same having been considered, and the judge being absent from the district and having filed a decision in writing—

It is here ordered in accordance with the conclusion therewith that the plaintiff take nothing by his bill of complaint, and that his complaint be dismissed, and that the issues therein be, and hereby are, decided in favor of the defendant, and that defendant is entitled to seven hundred and fifty dollars, counsel fees, and one hundred and fifty dollars per month for her maintenance since the 14th day of December, 1893, and judgment is ordered accordingly.

JNO. J. HAWKINS,
District Judge.

Filed June 6th, 1896.
J. E. WALKER, *Clerk,*
By C. H. KNAPP,
Deputy Clerk.

133 Title of the Court and Cause.

Decision of the Court.

Action for divorce.

In this cause the plaintiff asks a divorce on the grounds of desertion, and alleges in his complaint that such desertion and aban-

donment on the part of defendant occurred on the 18th day of December, 1893. It is further alleged in the complaint that there is no community property, and such divorce is asked, as above stated, solely on the ground of desertion.

To this complaint defendant filed a denial to each and every allegation of abandonment therein, and further made answer in the nature of a cross-bill, asking a divorce and affirmative relief for various acts of extreme cruelty alleged to have been committed on the part of the plaintiff and asks a divorce, and for many other matters of affirmative relief.

At a hearing of the cause defendant asked leave to withdraw her cross-bill and dismiss all that part of her answer asking for affirmative relief, which was granted. At the trial defendant also filed motion for alimony and counsel fees *pendente lite*.

Now, under the state of the pleadings, the only question to be determined is the motion asking for alimony and counsel fees,
134 and the right of the plaintiff to the prayer of his complaint.

The testimony is somewhat voluminous, but upon the questions at issue it is quite meagre. Plaintiff testifies in substance that he and the defendant were married on the 12th day of October, 1875, at Baltimore, Maryland; that he and the defendant are not now living together; that defendant refused to go and live with him at the Lemon hotel, in Phœnix, about the 14th day of December, 1893, where he had secured rooms, which were the same which he and the defendant had had there six or eight months prior to that time; that there was some understanding between him and this defendant about living at this hotel; it was after they found they could not live together in peace out at the home place, half a mile north of Phœnix, and plaintiff told her he would not live there (at the home place) any longer.

That he had good reasons to move, and that they had lived peac-ably together at the Lemon hotel before, and she said that she was willing to go anywhere with him that he was willing to live; that she was willing to live in a tent if necessary.

He engaged rooms about the 5th of December, 1893, and told defendant he had engaged them, and wanted her to get ready as soon as she could and move there to live as they had done before. She wanted to know when he wanted her to move. He said in two or three days.

135 She said she could not get ready in that time. Plaintiff quit the house at the home place on the 14th day of December, 1893, in the afternoon, and moved to the Lemon hotel. No conversation took place between him and the defendant at that time for the reason that she was downtown when he left. There was a conversation between plaintiff and defendant at the dinner table on the day plaintiff left.

Plaintiff told her at the dinner table, in the presence of Mrs. Lount, that he was going to the Lemon hotel to live, and wanted her to get ready and go with him. Then she said that she had no idea of going there. There was no further conversation between plaintiff and defendant until the 18th of December, 1893, when

plaintiff went to the home place and served a notice upon her; he handed the paper to her himself and kept a copy of it. They had some conversation. He moved some furniture into another part of the house, and there was some protestation about it on her part.

He thinks the paper was about all that passed between them in regard to her coming to live with him at the Lemon hotel. The paper served upon defendant by the plaintiff is the following:

PHŒNIX, ARIZONA, *December 18th*, 1893.

I now demand that you do come and live with me at the
136 place I have provided for us both at the Lemon hotel, and that our matters and differences heretofore existing between us be forgotten.

JAMES T. SIMMS.

To Mrs. H. T. Simms.

The plaintiff and defendant have never lived together since that date. Plaintiff continued to live until the 20th of June at the Lemon hotel, in Phœnix; then moved to the Monihan building, in Phœnix, where he now resides.

No conversation has passed between plaintiff and defendant since December 18th, 1893.

Mr. A. Barry, a witness for plaintiff, testifies in substance that he saw the notice (Exhibit A) and was present at the time it was delivered by James T. Simms to Hannah T. Simms. He does not remember very well the conversation which took place between Mr. and Mrs. Simms at that time, but thinks that when they went in Mrs. Mimms and a young lady was at dinner, and that Mr. Simms went in and offered her the paper. She refused to receive it or to look at it at all, but the young lady that was there offered to go to an attorney for some instructions for Mrs. Simms. He don't remember the name of the young lady, but she went away and came back again after a while and told Mrs. Simms something, and then Mrs. Simms read the paper. "Mr. Metcalf, Mr. Simms, and I went
out in the meantime to look at some lots on the north of
137 the house and stayed around, so that we could keep an eye upon the place and see the young lady when she returned from town. When she came back we went toward the house, and when Mrs. Simms had read the paper she said to him (Simms) that she would not go with him to live at the Lemon hotel. I do not remember the distinct words, but remember that she spoke very earnestly, saying that she would not go."

Mr. Baldwin, a witness for the plaintiff, testifies that the plaintiff has been living in the Monihon building, in Phœnix, ever since June 20th, 1894, and living alone and not with defendant; that the Monihon building is a business block situate in the center of the town and on one of the principal streets of the town. It is a building occupied by offices in the second and third stories and by stores in the first story. He also enumerates the persons living in the Monihon building as occupied by doctors, a lawyer, an architect, a family, and secret lodges on the third floor.

Mr. Simms, on being recalled, says that he lived at the Lemon hotel for over six months—that is, from the 14th of December, 1893, to the 20th of June, 1894, and the Lemon hotel was his home during that time; that he selected said hotel as his residence and went there and lived there for that length of time.

Mr. George Simms testifies that he is the son of plaintiff;
138 that his father lived at the Lemon hotel, in Phœnix, from the 14th of 15th of December, 1893, to the 20th of June, 1894, and that he lived there alone; that the defendant was never seen there at the Lemon hotel by him during that time; that he frequently visited his father during that time.

He (witness) lived on the ranch on Center street near Phœnix during that time, about ½ mile north of town. His father had lived there on the ranch up to December 14th, 1893; that this ranch had been the home of Colonel and Mrs. Simms, he thinks, from about the year 1882; that it had been their home for a long time. Mrs. Simms occupied a part of the same house during the time that he lived on the ranch; that it is the old homestead; that he is married, and that his brother also lives at the same house. He is married also, and his wife is living there with him.

This is the substance of all the testimony on behalf of the plaintiff.

On behalf of the defendant the evidence of Mr. J. T. Simms shows that on October 5th, 1893, he had a lawyer employed, and he admits the receipt of letter of date of September 15th and numerous other letters referred to in the testimony taken by referee.

He also received Exhibit No. I of the defendant, which is in reply to the notice served by him, which is as follows:

PHŒNIX, ARIZONA, *December 18th*, 1893.

139 Hon. James T. Simms, Lemon hotel, Phœnix.

MY DEAR HUSBAND: It is with surprise that I have read your letter of today to me; let me quote it in full:

"PHŒNIX, ARIZONA, *December 18th*, 1893.

"I now demand that you do come and live with me at the place I have provided for us both at the Lemon hotel, and that our matters and differences heretofore existing between us be forgotten.

(Signed) JAMES T. SIMMS.

To H. T. Simms."

I cannot understand why you should leave our comfortable homestead and reside at the Lemon hotel. You know that the place is cold and gloomy and ill-fitted for old folks like ourselves to reside in, especially in the winter time. I am also informed of a fact that I believe to be true, and which I am certain you cannot know, judging from your request—that is, that that hotel is not, as it is now conducted, a fit or proper place for a respectable woman to reside in.

My dear husband, If we did not have a comfortable and con-

venient home, suitable to us in our old age, I would be willing to go anywhere with you to reside, most anywhere, and all that I would ask would be your love and affection and manifestations of it, as I once had.

140 For you to deliberately leave our home and immure yourself in that hotel is inexplicable to me. Your letter above quoted is equally inexplicable, and surely could not have eminated from you, but must have been written in the dictation of some one who wants to place me in a false light and for some purpose that can bode neither of us any good.

And in this connection let me say that I am grieved and hurt almost beyond measure by the further fact that I am informed by Mr. Trask, the groceryman, by the employees of Mr. Hurley, the butcher, that you have given orders to them not to allow any further purchases of food or supplies for the house—my home and yours—to be made by me or my order upon your account or to your credit. How do you expect me to live? The milkman has stopped leaving milk. Am I to presume that you have given him similar orders?

If you are angered simply because I object to your sons and your son's family taking possession of our home and we being obliged in our old age to vacate that home and take up our abode at lodging-houses or hotels upon that account, then surely you are unjust to me.

So far as our matters and differences heretofore existing (to use the language of your letter) are concerned, I fail to compre-

141 hend your meaning. There can be none upon my part and are none aside from my desire to reside uninterruptedly with you in our home and to preserve my property from incumbrance and to have paid to me what is justly mine, that I may not be without means in the last days of my old age. My affection for you is now as it has always been, and it does seem strange that while I have always been and am willing to forgive and forget past indignities and cruel treatment and to abide with you until death do us part that you should persist in doing things that you know can but cause me heartaches and mental anguish.

Let me say in conclusion, come home to the homestead, and let us live there, surrounded by our home comforts, as we should live and as I wish to live, and don't let your love for your boys, who are young and vigorous and able to take care of themselves, drive me from the home of my old age.

Your affectionate wife,

(Signed) HANNAH T. SIMMS.

Mrs. Simms in testifying for herself says she has been living on the ranch for about 7 or 8 years, at the home place, which is on Center street, about ½ mile north of Phœnix; says the house is very comfortable and fairly well furnished, and that "we" always considered it a most desirable place of residence, and that it was the most pleasant place in or about the city.

There are many large shade trees surrounding the place;

142 they have plenty of ditch water and are well arranged for water from the hydrants, and it is considered the most attract-

ive place about Phœnix. Her family is composed of Mr. Simms, herself, and his son George; that her relations with Mr. Simms up to December 14th, 1893, have been very happy.

Regarding the matter of Mr. Simms and Mrs. Simms at the house on the day the notice was served upon her, she says she thinks there were four ladies there at the time at dinner with her, and the door bell rang. Some one went to the door and Mr. Simms entered, accompanied by two gentlemen. There was Mr. Barry and another gentleman whom she didn't know. He entered the room, and, without noticing any one at all, he came around to her in a very positive manner and said, "Read that (handing me this paper) and answer it."

Prior to this he had advised her, in a sarcastic manner, not to answer any question without consulting an attorney, and when he handed her that paper she said to him that she preferred not to answer it until she consulted with her attorney.

Mrs. Fridell was one of the ladies there in the room and offered to go and take the paper to her attorney, who at that time was Mr. Williams, and when she came back she said that he told her (Mrs. Simms) to answer it. She said her answer to it was as follows:

143 "I said, Mr. Simms, I don't want to go to the Lemon hotel. If we must leave here, take me to a tent or to any other place, but not to the Lemon hotel. When I gave him this answer he brought these two men on in, and he said to them, Do you hear that? That is all I want."

That the place was fitted up for living and with family accommodations, and that after she had refused to go to the Lemon hotel he, Mr. Simms, went out and called in two Mexicans, who had been waiting around there all day, and he kind of requested me to move my things off the table, my silverware, presents, etc. Then he commenced moving each article of furniture, dishes, tables, chairs, the remains of our dinner, which was yet upon the dining table, and everything out of the house.

He then took everything out of the kitchen, even the last loaf of bread and the stove. I pleaded with him not to take them and to leave me at least the stove upon which to cook *them*, and I plead with him to leave me some of the things, but he said that he had use for them and was going to take them, and he tookt hem.

Mrs. Warren went with me to plead with him to let me have the stove, so that I could do my cooking, but he said, I have use for these articles, and your credit is better than mine here in town, so he took them.

Ever since she has be-n living at the homme place and still
144 leves there, but they (Mr. Simms and his son) nailed up some of the doors. These doors were nailed up the next morning, and her trunk and other things were all thrown out of the back door; just thrown out and left there.

She also gives a conversation which she had with Mr. Simms prior to December 14th in relation to her going to the Lemon hotel to live. She objected to going to this hotel, and says that while she

was in the East he wrote her that he was going to get rooms at the Lemon hotel. She wrote to him and told him not to make any arrangements for those rooms, for they were dark, dreary, and unpleasant rooms, and there was no privacy about the rooms at all, and that it was a very objectionable place to board, and she objected to his engaging them, and wrote that perhaps it would be better not to make any definite arrangements.

She says that at no time did she intend to desert her husband; that she would suffer death before she would think of doing so; that she never refused to go with him anywhere, except to the Lemon hotel; that he always made plans for their residence on the home place; that she is willing now and at any time to live with him at any place suitable and respectable, excepting the Lemon hotel, and that it never was her intention to abandon him at all.

Then there is a large amount of other testimony given by both plaintiff and defendant regarding property rights existing
145 between them. This I do not think is material to notice at this time.

These parties are each about sixty-four or sixty-five years old, according to the testimony, and have lived together since the date of their marriage up to December 14th, 1893.

Miss Buford, a witness for the defendant, testifies regarding the conversation between plaintiff and defendant on the 18th of December, 1893, at the Simms residence, near Phœnix, saying that she was present with several others and names them; that they were taking lunch with Mrs. Simms when Mr. Simms came and rang the door bell; Mrs. Fridell went to the door and he came in with two gentlemen; then he passed around to the head of the table, where Mrs. Simms was sitting, and handed her a paper, saying to her, "Read that and answer it." She said, I cannot answer it now without consulting my attorney. He said, Read it and answer it. She said, No; I cannot without consulting my attorney. And she asked Mrs. Fridell if she would take it to her attorney for reply, and so she did, and while she was gone to see Mrs. Simms' attorney these gentlemen went outside and waited until Mrs. Fridell returned. Mrs. Simms would not read the paper when he handed it to her, but when Mrs. Fridell returned from her attorney she read it and said, "I will not go to the Lemon hotel; any place but
146 there." He then said, "Gentlemen, do you hear that? That is all I want to know," and they left the house.

She also corroborates Mrs. Simms regarding the movement of the furniture and conversation had between Mr. and Mrs. Simms while this moving was going on. She further testifies she was there as a companion to Mrs. Simms; that she was not employed; she just expected to remain there that night and for a short time.

Mrs. Lount, a witness for the defendant, gives details of conversation between plaintiff and defendant on December 14, 1893, regarding the defendant moving to the Lemon hotel. The testimony is substantially the same on that point as Mrs. Simms', with the exception that Mrs. Lount tries to act the part of peace-maker between the parties and seemed to try to settle the difficulty between them from

her statement of the case. There is very much other testimony regarding the value of various parcels of real estate owned by these parties which I do not care to go into at this time.

It will be seen from the foregoing testimony in this case that the abandonment attempted to be proven is about as follows: On the 14th of December, 1893, the plaintiff left his home, about ½ mile north of Phœnix, on Centre street, and went to the Lemon hotel, in town, to live. He claims that he had an understanding with the defendant so to go to this hotel and live with him. She says
147 she agreed to go anywhere else and live with him, but would not go to this particular hotel. Her testimony is corroberated by almost every witness in the case, and especially by witness Barry, Buford, and Lount.

The only question to be determined in the case is whether or not the allegation of abandonment has been proved.

In order to determine the question of abandonment we must first determine what was the intention of the defendant in the case as well as the intention of the plaintiff. Did the defendant, according to the testimony in the case, intend to abandon the plaintiff?

When I first noticed the pleadings in this case and before I had read the voluminous testimony therein I presumed that a divorce would be granted practically as a matter of course, especially if the proof of the plaintiff in any way substantiated the allegations of his complaint and that of the defendant, her cross-bill, and the only difficult question would be the division of the property rights in the case.

As stated before, on account of defendant having withdrawn her cross-bill, everything is eliminated from the case except the right of plaintiff to recover.

For the purpose of determining the intention of the parties to this action and looking solely to the testimony in such case, I find
148 that in order for plaintiff to recover and make out a case for the dissolution of his marriage with the defendant on the ground of desertion he must satisfactorily prove three things:

First. Cessation of cohabitation.

Second. An intent in the mind of the defendant to desert.

Third. That the separation was against the will of the plaintiff.

The testimony clearly shows that the first of these points is proved, but is the second or third point?

The testimony, to my mind, clearly shows that the defendant had no intention whatever in her mind of deserting or abandoning the plaintiff. This disposes of the second point necessary to be proved in all cases brought on the ground of abandonment.

According to the evidence in the case she was nicely situated in a home that had been prepared for herself and husband, and on a certain day when she was at luncheon with her friends, he came to this home and demanded that she change her place of abode and go to the hotel, about ½ mile from home, and live there instead of at the home which had been prepared.

My view of this matter is that this was an unreasonable request on the part of the plaintiff. That while the law requires the domicile

of the husband to be that of the wife, still it does not require
149 unreasonable things, and for a person, being located with his wife at a beautiful home, surrounded with all the comforts and necessaries of life, and for the husband to go into that home and from pique or from some motice that is not disclosed by the testimony, to require his wife to immediately leave that home and go to any hotel, no matter how good, only a half mile distant, and live in a suit- of rooms, I am of the opinion that it is an unreasonable request; and that the wife's refusal under such circumstances to leave the home and homestead, does not constitute an abandonment on her part.

The courts have repeatedly declared that to constitute desertion, the deserter must absent himself or herself from the other party, of his or her own accord, and without the consent and against the will of the other. That one is the deserter in whose mind the desire and intent to destroy the marriage relation exists.

I am certain, from the testimony in this case, that it was not the intent of the defendant to destroy the marriage relation existing between herself and the plaintiff.

As to the third point necessary to be proved, I am also of the opinion, from the action of the plaintiff in the case in serving a notice, typewritten for the occasion, upon his wife, that such action does not show that the wife's remaining away was against his will,
but it rather shows, to my mind, that it was the intention of
150 the plaintiff to make out a case of desertion and lay the ground for a divorce suit.

And his own exclamation to his witnesses at the time he served the notice shows that all he wanted was to get a refusal of his wife to go to the Lemon hotel to live, evidently believing that this would constitute desertion on her part.

The marriage contract is one of too great public interest to be so lightly shattered by the courts. No court, so far as I have been able to find from the examination of the books, has ever granted a divorce under such a state of testimony.

It does not appear from the testimony that the plaintiff, after going to the home place and serving written notice on his wife, ever afterwards attempted a reconciliation. So far as the testimony is concerned, he accepted her refusal to go to the Lemon hotel as entirely satisfactory, and he undertakes to establish his case solely on the ground of her repeated refusals to go to live with him at the Lemon hotel.

According to my view of the testimony, situated as she was, she was entirely excusable in refusing to live with him at the Lemon hotel. I cannot help but consider that if the plaintiff had gone to his wife in a conciliatory manner these two old people would
151 now be living peacefully and happily at the beautiful home they had made for themselves a half mile north of Phœnix, on Centre street.

According to the testimony of one witness, the trouble seems to have been the hatred of the defendant for the plaintiff's children. This question was not gone into very minutely in the testimony in

this case. It, however, shows that the plaintiff placed two of his grown sons with their wives in the home place and in the same house with her. This may or may not have been an unreasonable thing to do. It is the duty of every person who is able to do so to provide for his children; but it is not the duty of a husband to crowd his own wife out of her home and house—which seems to have had a homestead filed thereon both by plaintiff and defendant—either by his children or by any one else without her consent.

It appears on the hearing of the case that plaintiff has not provided anything for the defendant since their separation. She also had to pay for her numerous counsel to defend her rights. I do not think it necessary to make provisions for the payment of all those counsel, as she had three firms employed.

She is, however, entitled to a reasonable compensation for her counsel and to a reasonable support pending this action.

I am of the opinion that the judgment should be for the
152 defendant and the bill of complaint dismissed, and that defendant be allowed $750.00 counsel fees (seven hundred and fifty dollars), and $150.00 (one hundred and fifty dollars) a month since the 14th of December, 1893, and that a decree enter accordingly.

JOHN J. HAWKINS,
District Judge.

(Endorsed:) Title of the court and cause. Decree of the court. Filed June 6th, 1896. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

Office of the clerk of district court.

PHŒNIX, ARIZONA, *June 6th*, 1896.

Title of the Cause.

To Hannah T. Simms, defendant:

You will please take notice that the decision and judgment of the judge who tried the above-entitled cause (Hon. Jno. J. Hawkins) have been filed with me this 6th day of June, 1896, A. D.

J. E. WALKER, *Clerk*,

Service acknowledged June 6th, 1896.

By JOS. H. KIBBEY,
MILLAY & BENNETT,
BARNES & MARTIN, *For Def't.*

153 *Motion for a New Trial.*

Title of the Court and Cause.

Now comes the plaintiff in the above-entitled action and moves the court to vacate and set aside the judgment rendered in said cause and to grant plaintiff a new trial therein upon the following grounds, to wit:—

I.

Upon the ground that the court erred in admitting and rejecting evidence.

II.

That the judgment of the court is contrary to the law.

III.

That the evidence does not sustain the judgment of the court.

IV.

That the judgment for alimony and counsel fees is excessive and unjust and contrary to law.

V.

That the defendant should not have been allowed to dismiss her cross-bill in said action against plaintiff's objection.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Defendant.

Service of copy of foregoing motion admitted this 8th day of June, 1896.

JOS. KIBBEY,
One of the Att'ys for Def't.

154 (Endorsed:) Title of the court and cause. Motion for a new trial. Filed June 8th, 1896. J. E. Walker, clerk.

Notice of Judgment and Decision.

Title of the Court and Cause.

I, J. E. Walker, clerk of this court, do hereby certify that the decision and judgment of the Hon. J. J. Hawkins in the above-entitled cause was filed in my office on the 6th day of June, 1896, and that on the 6th day of June, 1896, I notified the plaintiff and defendant personally in writing of the filing of said decision and judgment, which said notice stated the title of said cause and that the said decision and judgment had been filed with me.

Dated this 13th day of June, 1896.

J. E. WALKER, *Clerk.*

(Endorsed:) Title of the court and cause. Notice of decision and judgment. Filed June 13th, 1896. J. E. Walker, clerk.

Order Entering Judgment.

The Title of the Court and Cause.

The decision and judgment in this cause of the Hon. J. J. Hawkins, judge of the 4th judicial district of the Territory of Ari-
155 zona, before whom the cause was tried, having transmitted to and filed with the clerk of this court on the 6th day of

June, 1896, and it appearing to the court by the certificate of the clerk of this court that on the 6th day of June, 1896, and seven days prior thereto, the clerk of this court notified in writing the parties to this suit that the said decision and judgment has been filed with him, it is therefore ordered and directed that the said decision and judgment be entered of record in this court as the decision and judgment of this court.

Dated this 13th day of June, 1896.

A. C. BAKER, *Judge.*

(Endorsed:) Title of the court and cause. Order entering judgment of record. Filed June 13th, 1896. J. E. Walker, clerk.

Title of the Court and Cause.

Stay of Execution.

Judgment having been rendered in the above cause in favor of defendant and against plaintiff, on the 13th day of June, 1896, in the sum of $5,235.00, exclusive of costs, and a motion for a new trial having been filed by the plaintiff herein on the 15th day of June, 1896, and said motion being now pending and undetermined in said court, it is therefore ordered that all proceedings on said judgment be stayed until the determination of said motion for a new
156 trial, and it is hereby directed that the clerk of said court recall any execution which he may have made on said judgment.

Dated June 25th, 1896.

JNO. J. HAWKINS, *Judge.*

(Endorsed:) Title of the court and cause. Order. Filed June 27th, 1896. J. E. Walker, clerk.

Motion for New Trial Overruled.

Title of the Court and Cause.

The motion for a new trial in the above-entitled cause heretofore filed in said action having been by me duly considered, it is hereby ordered, adjudged, and decreed that said motion be, and the same is hereby, overruled.

JNO. J. HAWKINS, *Judge.*

(Endorsed:) Title of the court and cause. Order overruling motion for new trial. Filed June 29th, 1896. J. E. Walker, clerk.

Notice and Motion for Alimony.

Title of the Court and Cause.

To James T. Simms, plaintiff in said cause:

157 Please take notice that on the 27th day of July, 1896, or as soon thereafter as counsel can be heard, counsel for said de-

fendant will present the motion, a copy of which is hereto attached, to said court and to Hon. J. J. Hawkins, before whom said cause is pending, at the city of Prescott, A. T., and press the same to a hearing and decision thereon.

Dated this 15th day of July, 1896.

JOSEPH H. KIBBEY,
MILLAY & BENNETT, AND
BARNES & MARTIN,
Att'ys for Def't.

Title of the Court and Cause.

Comes now the defendant, Hannah T. Simms, by Joseph H. Kibbey, Millay & Bennett, and W. H. Barnes, her attorneys, and moves the court for an order upon the plaintiff, James T. Simms, that the said James T. Simms pay to the said defendant a sufficient sum of money to enable this defendant to defend the appeal to the supreme court of this Territory, taken by the said plaintiff from the judgment and order and decree of this court, denying the prayer of said plaintiff's petition for a divorce from this defendant, and ordering and decreeing the payment by said plaintiff to said defendant the sum of $150.00 per month from December 14th, 1893, and the further sum of $750.00 as attorneys' fees to the time of said decree,
and also a reasonable sum per month for her maintenance
158 and support from the time of the rendition of said decree
and order, and to continue during the pending of this suit and said appeal.

This motion is made upon the affidavit hereto attached and the files in this cause and in case No. 2654, now pending in this court.

JOS. H. KIBBEY,
MILLAY & BENNETT, AND
W. H. BARNES,
Att'ys for Def't.

Title of the Court and Cause.

Hannah T. Simms, being first duly sworn, on her oath says that she is the defendant in the above-entitled cause; that no part of the judgment and order for alimony and counsel fees to be paid by said plaintiff to said defendant, rendered in said court on June 13th, 1896, has been paid to said defendant.

That on the — day of June, 1896, the said plaintiff gave notice of an appeal from the said judgment and from the order overruling the motion for a new trial in this cause, and filed in this court an appeal bond in double the amount of said judgment and costs, which said bond was, on the 30th day of June, 1896, duly approved by the clerk of this court, thereby suspending the operation of said
judgment pending such appeal.
159 Affiant further says that she is now and ever since the
commencement of this action has been living at the family homestead of affiant and said James T. Simms, and that the said James T. Simms has not, since December 13th, 1893, contributed to

her support in any manner; that she is now destitute of any means of support and has no means whatever wherewith to supply herself with even the bare necessities and commonest comforts of life; that said James T. Simms has warned all merchants and trades-people of Phœnix from whom affiant has heretofore procured necessary supplies from trusting her even for the necessaries of life, and that by these means she is reduced to absolute destitution.

Affiant further says that she has title to a quarter section of land near Phœnix and has no other property of any description whatever, and that the said quarter section is not in cultivation and is wholly unproductive and is now encumbered for eleven thousand dollars, and that she can borrow no further money upon it; that a large part of said encumbrance affiant was induced by said James T. Simms to and did place upon said land for the purpose of securing a note of said James T. Simms for money borrowed by him for his own sole use and benefit, and with the express promise of said James T. Simms that he would pay off the same when due, but that he has not paid the same or any part thereof, and that the said mortgage is now in the hands of the attorney of said
160 James T. Simms for collection, who now threatens to foreclose the same because of the default of said James T. Simms in the payment of his said note.

Affiant further says that the said James T. Simms, in order to further embarrass affiant and in order to prevent the possibility of affiant's being able to sell any part of the said quarter section of land owned by affiant as aforesaid, on the 30th day of June, 1896, caused a *lis pendens* to be filed in the recorder's office of Maricopa county, A. T., against said premises, a copy of which is hereto attached, marked Exhibit A; which said *lis pendens* was so filed under the following state of facts:

On the 8th day of June, 1896, and after the filing of judgment in this cause and before the same could be and was entered of record in this court as the judgment of this court, the said James T. Simms, for the purpose of defrauding this defendant and preventing the collection of said judgment, caused a corporation to be organized, to be known as the Simms Improvement Company, consisting of the said James T. Simms, his son, Charles T. Simms; C. F. Ainsworth, one of his attorneys, and two others, and before the entering of said judgment, for the purpose of hindering, delaying and defrauding, and defeating affiant in the collection of said judgment, and with the full knowledge of all the constituent members of said corporation of said purpose, and without consideration, con-
161 veyed to said corporation and to said Chas. T. Simms all of the property then owned by said James T. Simms, which property was of great value and, as affiant is informed and believes, was and now is worth more than one hundred and fifty thousand dollars.

That thereupon this affiant, before any steps were taken by said James T. Simms to perfect an appeal in this cause, commenced an action in this court against said James T. Simms, the Simms Improvement Company, *et al.* to set aside the said conveyances by said

James T. Simms as fraudulent and void as to this affiant, and that the said Simms Improvement Company in its answer to said action claimed damages against this affiant to the amount of $30,000.00 because of the bringing of said action by affiant, and filed the *lis pendens*, a copy of which is hereto attached, in the recorder's office of said Maricopa county.

That by reason of the said acts and doings of the said James T. Simms affiant has been rendered powerless to sell or further mortgage said premises for her support, and that in consequence thereof she is now destitute of means to support herself and without means to defend the plaintiff's appeal to the supreme court of this Territory in this cause.

Affiant further says that the said James T. Simms is still the owner of all the property so conveyed by him to the said Simms Improvement Company and the said Charles T. Simms as aforesaid; that a large part of the same is now in cultivation and is pro-
162 ductive property, and that the said James T. Simms derives therefrom a revenue of more than five hundred dollars per month, as affiant is informed and believes, and that said James T. Simms has no family dependent upon him except this affiant.

HANNAH T. SIMMS.

Subscribed and sworn to before me this 16th day of July, 1896.

LAVINIA M. ANDREWS,
Notary Public.

[NOTARY SEAL.]

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

HANNAH T. SIMMS, Plaintiff,
vs.
THE SIMMS IMPROVEMENT COMPANY, JAMES T. SIMMS, Charles Simms, Chas. F. Ainsworth, William Christy, and Thomas D. Bennett, Defendants.
} *Lis Pendens.*

Notice is hereby given that in the above-entitled action *all* defendants therein named, The Simms Improvement Company, by virtue of the law has *had* its answer and cross-bill in said action claimed affirmative relief against the said plaintiff and in favor of said defendants, The Simms Improvement Company, in the sum of thirty thousand dollars damages upon the ground that plaintiff herein, well knowing that defendant for a good and valuable consideration purchased from James T. Simms the land de-
163 scribed in the complaint on file in the above-entitled action, caused said suit to be instituted in said court and the notice of *lis pendens* filed therein in the county recorder's office of Maricopa county, Arizona Territory, with the intent and for the sole and only object and purpose of injuring, damaging, and preventing this defendant from improving, platting, and subdividing said land for sale to profit and advantage, thereby hindering and harrassing the defendant in its business, and by reason of this action and *lis pendens* aforesaid casting a cloud upon the title to this defendant's

property, by reason of which this defendant has been damaged in the sum of $30,000, and that this defendant, having been informed and so believing that said plaintiff is the owner in her separate right of all the following-described property, to wit, the S. W. ¼ of sec. 32, tp. 2 N., R. 3 E., G. & S. R. B. & M., Maricopa county, Arizona Territory, hereby files this notice of *lis pendens* to become and be declared constructive notice to all the world that this defendant has claimed in said action certain affirmative relief, to wit, $30,000, and by virtue of said claim of affirmative relief asks that any judgment herein had or obtained by the defendant by reason of this claim for damages against said plaintiff may become and be declared a lien upon said plaintiff's land described herein from the date of the filing of this defendant's separate answer in the
164 above-entitled action, and that said premises be so effected by this action until the same be finally tried, and any affirmative relief obtained by this defendant be satisfied out of said land, or otherwise as plaintiff may see fit.

THE SIMMS IMPROVEMENT COMPANY,
By PIERCE EVANS, *Att'y for Def't's.*

Filed and recorded by Pierce Evans June 30th, 1896, at 12.00 m.
J. W. KINCAID,
County Recorder,
By M. McNAIR, *Deputy.*

(Endorsement:) Title of the court and cause. Notice and motion for alimony. Service by copy of the within notice and motion admitted this 16th day of July, 1896. Fitch & Campbell. Pierce Evans, att'y for *pl'ff.* Filed July 25th, 1896. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

Decree.

Title of the Court and Cause.

Decree.

The defendant herein having filed her motion for alimony pending the appeal of defendant to the supreme court of this Territory crom the judgment of this court herein rendered on the 6th day of June, 1896, and entered as the judgment of this court on June 13th,
165 1896, and for a reasonable sum as counsel fees to enable defendant to defend said appeal, and said motion having been noticed for hearing in this court before Hon. J. J. Hawkins, before whom said cause is pending, at Prescott, A. T, on the 27th day of June, 1896, and a copy of said motion, notice, and affidavits in support of same having been duly served upon counsel for plaintiff on July 16th, 1896, and the court having considered said motion, it is hereby—

Ordered, adjudged, and decreed that the said plaintiff, James T. Simms, pay to the said defendant, Hannah T. Simms, the sum of two hundred and fifty dollars within ten days from this date for her immediate maintenance and support, the same being for

alimony from date of the former decree herein to August 1st, 1896, and that he pay to the said Hannah T. Simms the sum of one hundred and fifty dollars per month, payable monthly, in advance, commencing on the first day of August, 1896, and to continue during the pendency of this action; and it is further—

Ordered, adjudged, and decreed that the said plaintiff, James T. Simms, pay to the said defendant, Hannah T. Simms, or to her attorneys for her use, the sum of five hundred dollars as counsel fees to enable her to defend said appeal herein.

Dated this 27th day of July, 1896.

JNO. J. HAWKINS, *Judge.*

(Endorsed:) Title of the court and cause. Filed July 29th, 1896. J. E. Walker, clerk.

166 *Bond.*

Title of the Court and Cause.

Know all men by these presents that we, James Simms, as principal, and P. J. Cole and Wm. Christy, as sureties, all of the county of Maricopa, Territory of Arizona, are held and firmly bound unto Hannah T. Simms, of the same place, in the sum of eleven thousand dollars, lawful money of the United States of America, to be paid to the said Hannah T. Simms, her executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas in the above-entitled cause, on the 13th day of June, 1896, a judgment was rendered therein in favor of the above-named defendant, Hannah T. Simms, against the said James T. Simms for the sum of $750.00, attorneys' fees, and for one hundred and fifty dollars per month since the 14th day of December, 1893, amounting in all to the sum of five thousand two hundred and fifty dollars ($5,250.00), and from which judgment said James T. Simms has taken an appeal to the supreme court of the Territory of Arizona, and on said appeal desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, if the said James T. Simms shall prosecute
167 his appeal with effect and in case the judgment of the appellate court shall be against him he shall perform its judgment, sentence, and decree and pay all such damages as may be awarded against him upon such appeal, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands this 30th day of June, 1896.

JAMES T. SIMMS, *Principal.*
P. J. COLE AND
WM. CHRISTY, *Sureties.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

P. J. Cole and Wm. Christy, being each severally duly sworn, on oath depose and say that he is one of the sureties who executed the above and foregoing bond; that he is worth the sum of eleven thousand dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

P. J. COLE.
WM. CHRISTY.

Subscribed and sworn to before this 30th day of June, 1896.

CHARLES F. SIMMS,
[NOTARY PUBLIC SEAL.] *Notary Public.*

(Endorsed:) Title of the court and cause. Appeal bond. Approved and filed June 30th, 1896. J. E. Walker, clerk.

168 *Assignment of Errors.*

The plaintiff, appellant herein, presents the following assignment of errors committed in the district court in the proceedings had in said cause:

I.

The court erred in overruling plaintiff's motion for a new trial in said cause, and to which ruling plaintiff then and there excepted, said motion for a new trial being as follows:

Now comes the plaintiff in the above-entitled action and moves the court to vacate and set aside the judgment rendered in said cause and to grant plaintiff a new trial therein upon the following grounds, to wit:

I.

Upon the ground that the court erred in admitting and rejecting evidence.

II.

That the judgment of the court is contrary to the law.

III.

That the evidence does not sustain the judgment of the court.

IIII.

That the judgment for alimony and counsel fees is excessive and unjust and contrary to law.

169 V.

That the defendant should not have been allowed to dismiss her cross-bill in said action against plaintiff's objection.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Plaintiff.

Service of copy of foregoing motion admitted this 8th of June, 1896.

JOS. H. KIBBEY,
One of the Attorneys for Defendant.

(Endorsed:) Title of the court and cause. Motion for new trial. Filed June 8th, 1896. J. E. Walker, clerk.

See pages 132, 153, and 156 of Transcript.

II.

The court erred in allowing defendant to dismiss her cross-bill in said action against plaintiff's objection, and to which plaintiff excepted.

See Transcript, page 58.

III.

That the court erred in admitting the evidence of the defendant, Hannah T. Simms, against the objections of plaintiff after the dismissal of her cross-bill.

170 IV.

That the court erred in refusing to grant plaintiff's motion to strike out the evidence of the defendant upon the ground of her refusal to answer in her cross-examination by the plaintiff certain questions material to the issue.

See page- 62, 63, 64, 65, and 66 of Transcript.

V.

That the court erred in allowing defendant to introduce certain letters, respectively marked Exhibit 1, page 99 of Transcript; Exhibit 2, page 101 of Transcript; Exhibit 3, page 102 of Transcript, and Exhibit 4, page 103 of Transcript, against the objection of plaintiff.

VI.

That the court erred in granting defendant's motion for provisional alimony and counsel fees, to wit, one hundred and fifty dollars per month from December 14th, 1893.

See page 116 of Transcript.

Decree of the court, at pages 133 to 155, inclusive, inasmuch as it is clearly shown by the counter-affidavits of plaintiff—

See Transcript, pages 119, 122, and 123—

that defendant was abundantly provided for, and had in her possession and under her control sufficient property to support
171 her according to her position in life—property of the value of forty thousand dollars.

VII.

That the court erred in allowing defendant alimony from the commencement of this action, December 14th, 1893, at the rate of one hundred and fifty dollars per month, in that no alimony can be

allowed except after notice, and only from the date of the order granting such alimony, if at all, and then in only such sum as may be consistent and in proportion to the means of her husband.

VIII.

That the Hon. J. J. Hawkins had no jurisdiction to try this cause, for the reason that no application was ever made by counsel for either the plaintiff or defendant for a change of venue from Hon. A. C. Baker, the judge having jurisdiction, to any other judge.

A cause can be removed from one court to another only in the manner provided by statute, and none of the statutory grounds for a change of venue are shown in this action, and the court having jurisdiction erred in ordering said cause tried before Hon. J. J. Hawkins.

See minute entry, p. 131, Transcript.

IX.

That the court erred in granting additional alimony and counsel fees in the final judgment where no divorce is granted, in so
172 far as the final judgment ends the litigation, and if the parties to the suit are still husband and wife the husband is required by law to support his wife, and he is liable for all debts contracted by her for necessaries, and the judgment herein rendered against the plaintiff for six thousand dollars, if valid, is community property and under the control of her husband.

If the husband should pay his wife the judgment and she should neglect to pay her creditors for the necessaries furnished her, such creditor could, nevertheless, collect such amounts of the husband.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Plaintiff.

(Endorsed:) Title of the court and cause. Filed January 6th, 1897. J. E. Walker, clerk.

Appellant's costs..... .... 189.55
Appellee's " 14.55

173 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

—, J. E. Walker, clerk of the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, do hereby certify that the above and foregoing transcript contains a full, true, and correct copy of the complaint, answer, replication of plaintiff, motion for provisional alimony, affidavits contravening motion for alimony, orders of court appointing referee, bill of exceptions and statement of facts, minute entries, decision of the court, motion for a new trial, notice of filing decision, order entering judgment of record, order staying execution, order

overruling motion for new trial, notice to parties of judgment, notice and motion for alimony, decree for alimony pending appeal, bond on appeal, assignment of errors, and clerk's certificate in case number 2083, entitled James T. Simms against Hannah T. Simms, as appears from the files of my office.

Given under my hand this 9th day of January, A. D. 1897, and the seal of said court.

J. E. WALKER, *Clerk.*

Transcript was demanded by Pierce Evans, counsel for plaintiff, on December 1st, 1896, and delivered to Pierce Evans on Jan'y 11th, 1897.

J. E. WALKER, *Clerk.*

174 (Endorsed:) No. 552. In the supreme court of the Territory of Arizona. James T. Simms, appellant, *vs.* Hannah T. Simms. Transcript. Filed Jan'y 11th, 1897. J. L. B. Alexander.

175 In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Appellant,
vs.
HANNAH T. SIMMS, Appellee.

Be it remembered that on the 11th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, to wit:

On motion of Joseph Campbell, for appellant, it is ordered that appellant be granted twenty days to file additional brief, and cause be then submitted on brief.

Be it further remembered that on the 13th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

In this cause it is ordered, on motion of Mr. Walter Bennett, for appellee, that he have five days to file reply brief in the cause to appellant's brief.

176 Be it further remembered that on the 26th day of January, 1897, a release of part of the judgment of the lower court for alimony was filed in said court in said cause by said appellee, of which the following is a copy, to wit:

In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Pl'f & Appellant,
vs.
HANNAH T. SIMMS, D'f't & Appellee.

Comes now the defendant and appellee herein, Hannah T. Simms, by J. H. Kibbey, Millay & Bennett, and W. H. Barnes, her attorneys, and *per*mits from the judgment for alimony and counsel fees recovered by the said defendant and appellee against the plaintiff and

appellant herein in this cause in the district court all of the said judgment for alimony and counsel fees in excess of the sum of five thousand ($5,000) dollars, to wit, the sum of two hundred and fifty ($250) dollars.

Dated this 26th day of January, 1897.

177 J. H. KIBBEY,
MILLAY & BENNETT, &
W. H. BARNES,
Attorneys for D'f't and Appellee.

Attest: —— ——,
Clerk of the Supreme Court of Arizona.

(Endorsed:) No. 552. In the supreme court of Arizona. James T. Simms, pl'ff & appellant, *vs.* Hannah T. Simms, d'f't & appellee. Release of part of judgment for alimony. Copy. Filed January 26th, 1897. J. L. B. Alexander, clerk.

Be it further remembered that on the 27th day of January, 1897, a motion to dismiss was filed by appellee in said court in said cause, of which the following is a copy, to wit:

In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Pl'f & Appellant,
vs.
HANNAH T. SIMMS, D'f't & Appellee.

178 Comes now the defendant and appellee herein and moves the court to dismiss on the ground that the plaintiff and appellant herein, James T. Simms, is in contempt of the district court, from which this cause is appealed, in wilfully and contumaciously refusing to comply with the order of said district court to pay to the said appellee certain sums ordered by said court to be paid by said appellant to said appellee for her support during the pending of this appeal and to enable appellee to employ counsel to defend*ant* appellant's appeal to this *cause* in this cause.

This motion is made upon the record of this case in this court and the affidavits hereto attached.

J. H. KIBBEY &
MILLAY & BENNETT &
W. H. BARNES,
Att'ys for D'f't & Appellee.

In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Pl'ff & Appellant,
vs.
HANNAH T. SIMMS, D'f't & Appellee.

179 TERRITORY OF ARIZONA, } ss:
County of Maricopa,

Hannah T. Simms, being first duly sworn, on her oath says that she is the defendant and appellee in the above cause; that judgment

was rendered in the district court of Maricopa county, Arizona, in said cause on the 13th day of June, 1896, denying the prayer of appellant's bill of complaint herein for a divorce from app-liant, and awarding appellee temporary alimony and counsel fees; that on the 30th day of June, 1896, and before adjournment of the term of said district court at which said judgment was rendered, said James T. Simms, appellant herein, having giving notice of an appeal from said judgment and from an order overruling his motion for a new trial of said cause, filed his bond on appeal to this court from said judgment; that on the 27th day of July, 1896, and before the adjournment of the term of said district court at which said judgment was rendered, affiant and appellee herein obtained an order from the said district court requiring the said James T. Simms, appellant herein, to pay to affiant, appellee herein, the sum of $250 within ten days from the date of said order and the further sum of $150 per month from the 1st day of August, 1896, and to continue during the pending of this action for her support pending this appeal and
180 the further sum of $500 as counsel fees to enable affiant and appellee to defend said appeal in this court, a copy of which said order is hereto attached, marked Exhibit "A" and made a part hereof; that affiant is informed and believes that a copy of said last-named order was served upon counsel for appellant on the 31st day of July, 1896; that the said order was not served upon the said James T. Simms in person, because ever since the said order was entered in said cause the said James T. Simms has absented himself from the Territory of Arizona and from the jurisdiction of this court, so that the said order could not be served upon him, and affiant is informed and believes, and therefore so states the fact to be, that the said James T. Simms is informed of the fact that the said order has been entered in said cause and ever since has contumaciously and in contempt of the order of said district court absented himself from this Territory for the purpose of avoiding the service of the said order upon him; that affiant does not know and by diligent inquiry is unable to ascertain the present post-office address of James T. Simms.

Affiant further says that no part of the money so ordered to be paid by the said James T. Simms for the support of affiant pending this appeal and to enable affiant to defend this appeal has been paid to affiant or to her attorneys, and that affiant is en-
181 tirely without means to support herself or to pay her attorneys and the officers of this court for their services herein, and that plaintiff and appellant has not since the commencement of this action contributed in any manner to the support of appellee or paid any part of the alimony ordered by said district court to be paid to appellee herein by said appellant.

HANNAH T. SIMMS.

Subscribed and sworn to before me this 23rd day of January, 1897.

[SEAL.] LAVINIA M. ANDREWS,
Notary Public.

EXHIBIT "A."

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JAMES T. SIMMS, Plaintiff,
vs.
HANNAH T. SIMMS, Defendant. } Decree.

The defendant herein having filed her motion for alimony,
182 pending the appeal of defendant to the supreme court of this Territory from the judgment of this court herein rendered on the sixth day of June, 1896, and entered as the judgment of this court on June 13th, 1896, and for a reasonable sum as counsel fees to enable defendant to defend said appeal, and said motion having been noticed for hearing in this court before Hon. J. J. Hawkins, before whom said cause is pending, at Prescott, A. T., on the 27th day of June, 1896, and a copy of said motion, notice, and affidavit in support of same having been duly served upon counsel for plaintiff on July 16th, 1896—

And the court having considered said motion, it is hereby—

Ordered, adjudged, and decreed that the said plaintiff, James T. Simms, pay to the said defendant, Hannah T. Simms, the sum of two hundred and fifty dollars within ten days from this date for her immediate maintenance and support, the same being for alimony from the date of the former decree herein to August 1st, 1896, and that he pay to the said Hannah T. Simms the sum of one hundred and fifty dollars per month, payable monthly in advance, commencing on the 1st day of August, 1896, and to continue during the pendency of this action; and it is further—

183 Ordered, adjudged, and decreed that the said plaintiff, James T. Simms, pay to the said defendant, Hannah T. Simms, or to her attorneys for her use, the sum of five hundred dollars as counsel fees to enable her to defend said appeal herein.

Dated this 27th day of July, 1896.

JNO. J. HAWKINS, *Judge.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial district of Arizona Territory in and for Maricopa county, hereby certify that I have compared the foregoing copy with the original decree in the above-entitled action, filed in my office on the 29th day of July, 1896, and that the same is a true copy of the original and of the whole thereof.

Witness my hand and the seal of said court this 29th day of July, 1896.

J. E. WALKER, *Clerk,*
By C. H. KNAPP,
Deputy Clerk.

[SEAL.]

184 In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Pl'ff & Appellant,
vs.
HANNAH T. SIMMS, D'f't & Appellee.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

Walter Bennett, being first duly sworn, on his oath says that he is one of the attorneys for appellee, Hannah T. Simms; that on the 31st day of July, 1896, he served a copy of the order of the district court in the case of James T. Simms *vs.* Hannah T. Simms, dated July 27th, 1896, and a copy of which is attached to the affidavit of Hannah T. Simms herein, upon Pearce Evans, one of the attorneys for the appellant, James T. Simms, by delivering to said Pearce Evans a true copy of said order.

WALTER BENNETT.

Subscribed and sworn to before me this 23rd day of January, 1897.

LAVINIA M. ANDREWS,
[SEAL.] *Notary Public.*

185 (Endorsed:) No. 552. In the supreme court of Arizona. James T. Simms, pl'ff & appellant, *vs.* Hannah T. Simms, d'f't & appellee. Motion to dismiss appeal. Filed Janu. 27th. J. L. B. Alexander, clerk. Rec'd a true copy of the within this 26th day of January, 1897. Fitch & Campbell.

Be it further remembered that on the 30th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

It is ordered that this cause be submitted, together with the motion to dismiss, on the coming in of the briefs to be filed herein.

Be it remembered that on the 18th day of February, 1897, an affidavit was filed in said court in said cause by said appellant, of which the following is a copy, to wit:

186 In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Plaintiff and Appellant,
vs.
HANNAH T. SIMMS, Defendant and Appellee.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

C. F. Simms, being first duly sworn, on oath deposes and says that he is a resident of Maricopa county, Arizona Territory, and the son of James T. Simms, the plaintiff in the above-entitled cause. Deponent says that he has constantly resided in the city of Phœnix, Ari-

zona, for the past two years. This deponent says that James T. Simms, the plaintiff in the above-entitled cause, left the Territory of Arizona on or about the 20th day of July, 1896; that the object of the said James T. Simms in leaving the Territory of Arizona was for the purpose of securing money for the Simms Improvement Company, of which he was president, for the purpose of paying up the indebtedness against the property of the Simms Improvement Com-
187 pany; that from Phœnix he went to Los Angeles to consult with some of the creditors of, viz., the Saving Bank of Southern ——, who then ands now hold a mortgage on a portion of the property of said Simms Improvement Company for twelve thousand dollars, besides the interest; that deponent knows of his own knowledge that said James T. Simms has been for some time prior thereto consulting with Frank Belcher, the then president of the Phœnix National Bank of Phœnix, Arizona, and that deponent knows that said Frank Belcher advised the said James T. Simms to incorporate a company and to transfer his property to that company as a better means of securing a loan thereon, and for that reason said James T. Simms, following said Belcher's instructions, after going to Los Angeles, went from Los Angeles to Chicago, where he expected to have met said Belcher, who was to assist him in the negotiation of a loan upon the property of the Simms Improvement —; that while said Simms was in Chicago and before said Belcher reached Chicago the said Belcher died in Texas on his way to Chicago; that said plaintiff has ever since been in Chicago and in Terre Haute, Indiana, and is now in the city of Chicago for the purpose aforesaid; that he is interesting parties in the property of the Simms Improvement Company and has had parties here in Phœnix to examine all of said property; that said James T. Simms is expected in Phœnix at any day as soon as he completes his arrangements for money on the
188 property of the Simms Improvement Company; that deponent knows of his own knowledge that said James T. Simms has had no income from said property since December 1st, 1896, except forty-five dollars, which is not enough to pay his board; that on one portion of the property there is a house, which is occupied by the defendant, and she refuses to allow any parties to occupy any portion of the house, and for that reason the plaintiff or the improvement company is unable to rent said property, and the same is now and has been for some time idle; that said plaintiff has no income property whatever except as above stated.

This deponent further says that no inquiry whatever has been made of him by defendant or any of defendant's attorneys as to the post-office address or whereabouts of the plaintiff; that other people have inquired of deponent as to his whereabouts, and he has always told them where to address him; that deponent has consulted with counsel for plaintiff, Pierce Evans and C. F. Ainsworth, and he is informed by them that neither of them have ever been inquired of by defendant or by defendant's attorneys or either of them as to the whereabouts or post-office address of said plaintiff.

This deponent further says that all the property formerly
189 belonging to said James T. Simms and now the property of the Simms Improvement Company, outside of Central place,

is heavily mortgaged, and that deponent knows of his own knowledge that the Simms Improvement Company and said James T. Simms *has* been unable to raise money sufficient to pay the interest or taxes on said property or any part of it, and that unless the said Simms or the said Simms Improvement Company shall succeed in raising money to take up the present loan that the same will be at the next term of the district court foreclosed and the property sold for the mortgage; that the property in Central place is tied up in litigation, and that the plaintiff or the Simms Improvement Company, either, *are* unable to raise a dollar on that property in the condition it is now in.

C. F. SIMMS.

Subscribed and sworn to before me this 8th day of February, 1897.

THOS. D. BENNETT,
[SEAL.] *Notary Public.*

190 In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Plaintiff and Appellant,
vs.
HANNAH T. SIMMS, Defendant and Appellee.

TERRITORY OF ARIZONA, *County of Maricopa,* } ss:

Charles F. Ainsworth, being first duly sworn, on oath deposes and says that he is one of the attorneys of record in the above-entitled cause and has been such attorney for the plaintiff ever since the commencement of said action; that the order for temporary alimony and suit money set out in defendant's motion to dismiss the appeal was never served upon this deponent, and deponent never knew of the contents thereof until the motion herein was served on this deponent. Deponent says that he knows of his own knowledge that James T. Simms went from Arizona to California on or about the 20th day of July, 1896; that during a portion
191 of the time said Simms was in California he was in Los Angeles and the balance of the time at Santa Monica; that the judge of said court who granted said order, to deponent's knowledge, to wit, Honorable John J. Hawkins, met said Simms in Santa Monica, also in Los Angeles, during said Simms' stay in California; that said Simms while in Los Angeles stopped at one of the public hotels in said city; that said Simms on leaving Los Angeles went to Terre Haute, Indiana, where he stopped with his son-in-law, and has ever since stayed with his son-in-law at Terre Haute, Indiana, except such times as he has been temporarily in Chicago; that neither the defendant nor any or defendant's attorneys have ever inquired of this deponent as to the post-office address or the whereabouts of the said James T. Simms; that deponent has been in constant communication with said Simms at all times since he left the Territory of Arizona, and could and would at any time have told

the defendant or her counsel if he had supposed they cared to know of his whereabouts and his post-office address.

C. F. AINSWORTH.

Subscribed and sworn to before me this 12th day of February, 1897.

A. J. EDWARDS,
Notary Public.

[SEAL.]

192 In the Supreme Court of the Territory of Arizona.

JAMES *A.* SIMMS, Plaintiff and Appellant,
vs.
HANNAH T. SIMMS, Defendant and Appellee.

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

Joseph Campbell, being first duly sworn, on oath deposes and says that he is one of the attorneys of record for the plaintiff in the above-entitled cause; that the order for suit money and temporary alimony set out in the affidavit of Hannah T. Simms, the defendant, was never served on this deponent, to the best of affiant's recollection and belief, and he never knew of its contents, except by hearsay, until the time of the making of defendant's motion in the supreme court to dismiss said appeal. Deponent further says that neither the defendant nor any of her said attorneys have ever inquired of him of the post-office address or whereabouts of the said plaintiff, James T. Simms; that deponent knew of his where-
193 abouts during the time he remained in California during the summer of 1896.

JOSEPH CAMPBELL.

Subscribed and sworn to before me this 16th day of February, 1897.

A. J. EDWARDS,
Notary Public.

[SEAL.]

In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Plaintiff and Appellant,
vs.
HANNAH T. SIMMS, Defendant and Appellee.

TERRITORY OF ARIZONA, *County of Maricopa*, } ss:

Pierce Evans, being first duly sworn, on oath deposes and says that he is one of the attorneys of record for the plaintiff in the above-entitled cause; that said plaintiff, James T. Simms,
194 left the Territory of Arizona on or about the 20th day of July, 1896, and that the defendant nor any of her attorneys has ever inquired of this deponent as to the post-office address of

whereabouts of said James T. Simms, and that ever since said James T. Simms went away from this Territory he could and would have advised them or either of them upon their request as to his post-office address.

PIERCE EVANS.

Subscribed and sworn to before me this 16th day of February, 1897.

[SEAL.] A. J. EDWARDS,
Notary Public.

(Endorsed:) No. 552. In the supreme court of Arizona Territory. James T. Simms *vs.* Hannah T. Simms. Affidavits of C. F. Simms, C. F. Ainsworth, Joseph Campbell, and Pierce Evans. Filed Feb'y 18, 1897. J. L. B. Alexander, clerk.

195 Be it further remembered that on the 23rd day of February, 1897, the same being one of the judicial days of the January term, 1897, the following proceedings were had in said court in said cause, to wit:

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court herein be, and the same is hereby, affirmed; and it is further ordered and adjudged and decreed that appellee herein recover of and from the appellant herein and Wm. Christy and P. J. Cole, the sureties in the appeal bond herein, the sum of fifty-two hundred and fifty dollars and her costs in the court, taxed at thirty-seven dollars.

Be it further remembered that on the 8th day of March, 1897, a motion for rehearing was filed by appellant in said court in said cause, of which the following is a copy, to wit:

196 In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Appellant,
vs.
HANNAH T. SIMMS, Appellee.

Motion for Rehearing.

Now comes the appellant above named and moves this honorable court for a rehearing in the above-entitled cause, and for grounds for such rehearing alleges:

First. That the judgment of said court is contrary to the evidence before said court.

Second. That the judgment of said court is contrary to the law and the evidence.

Respectfully submitted.

PIERCE EVANS,
Attorney for Appellant.

(Endorsed:) No. 552. In the supreme court of the Territory of Arizona. James T. Simms, appellant, *vs.* Hannah T. Simms, appellee. Motion for rehearing. Filed March 8th, 1897. J. L. B. Alexander, clerk.

197 Be it further remembered that on the 16th, day of March, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

In the cause W. H. Barnes, for appellee, in open court moved the court to strike out appellant'- motion for rehearing because the same was not made in compliance with the statute in such cases provided; whereupon Mr. Pierce Evans, for appellant, in open court moved the court for leave to amend said motion; whereupon it was ordered by the court that appellant have leave until two o'clock this afternoon to amend his said motion for a rehearing, and that said motion be then admitted.

Be it further remembered that on the 16th day of March, 1897, an amended motion for rehearing was filed by appellant in said court in said cause, of which the following is a copy, to wit:

198 In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Appellant,
vs.
HANNAH T. SIMMS, Appellee.

Now comes the appellant herein and, by leave of the court first had, files this his amended motion for a rehearing — alleges:

I.

That the court erred in confirming the judgment of the lower court.

II.

That the court erred in refusing to grant plaintiff a divorce upon inspection of the testimony in the case.

III.

That the judgment for alimony and counsel fees is excessive, unjust, and contrary to the law.

IV.

That the court below erred in not requiring defendant, she
199 being a party to the action, to answer on cross-examination questions put to her by the plaintiff tending to disprove the allegations in her cross-bill.

V.

That the court below erred in permitting the defendant to attempt to establish the allegations in her cross-bill by supplemental

affidavits after she had attempted to dissmiss it and the testimony had been taken and submitted in the case.

VI.

That no opportunity was given to the appellant herein for cross-examination of appellee upon said affidavits.

VII.

The judgment and decree of this court in confirming the judgment of the court below is contrary to the law and evidence as shown by the record and transcript in the case.

Wherefore appellant prays the order of this court granting a rehearing herein.

Alleppant shows that the names of the opposing counsel in this case are—

Millay & Bennett.

Jos. H. Kibbey; residence, Phœnix, Arizona.

W. H. Barnes; residence, Tucson, Arizona.

Dated March 16th, 1897.

200 PIERCE EVANS,
C. F. AINSWORTH,
FITCH AND CAMPBELL,
Attorneys for Appellant, James T. Simms.

(Endorsed:) No. 552. In the supreme court of the Territory of Arizona. James T. Simms, appellant, *vs.* Hannah T. Simms, appellee. Amended motion for rehearing. Pierce Evans, C. F. Ainsworth, Fitch & Campbell, attorneys for appellant. Filed this 16th day of February, 1897. J. L. B. Alexander, clerk. Service of copy admitted this 16th day of March, 1897. Jos. H. Kibbey, one of the attorneys for appellee.

Be it further remembered that on the 17th day of March, 1897, the same being one of the judicial days of the January term of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

In this cause it is ordered that the motion for rehearing filed herein by appellant be denied, and be it further remembered that on the same last-named day the following further proceedings were had in said court in said cause, to wit:

201 Mr. Pierce Evans, for appellant, in open court moved the court for an allowance of an appeal to the United States Supreme Court from the judgment of this court. It was ordered that the application be taken up at two o'clock this afternoon.

And be it further remembered that on the above last-named day the following further proceedings were had in said court in said cause, to wit:

In this cause it was ordered that the motion of appellant herein for an allowance of an appeal herein to the United States Supreme Court from the judgment of this court herein be granted and such

an appeal be allowed upon appellant filing a supersedeas bond herein in the sum of twelve thousand dollars.

In the Supreme Court of the Territory of Arizona.

JAMES T. SIMMS, Appellant,
vs.
HANNAH T. SIMMS, Appellee.

202 Know all men by these presents that we, James T. Simms, as principal, and Wm. Christy and P. J. Cole, as sureties, are held and firmly bound unto Hannah T. Simms in the sum of twelve thousand dollars ($12,000), to be paid to the said Hannah T. Simms, her attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of March, 1897.

The condition of the foregoing bond is this, namely: Whereas the said James T. Simms, appellant herein, is desirous of prosecuting his appeal to the Supreme Court of the United States from a judgment of the supreme court of the Territory of Arizona, rendered at the January term of said court, affirming the judgment of the district court of the third judicial district *court* of the Territory of Arizona in and for the county of Maricopa, wherein, at said district court, judgment was rendered therein in favor of the defendant and against the plaintiff for the sum of five thousand two hundred and fifty dollars, exclusive of costs; and whereas said James T. Simms, as the appellant in said supreme court of Arizona, is desirous of prosecuting a further appeal to the Supreme Court of the United States aforesaid, and having heretofore, to wit, on the 17th
203 day of March, 1897, obtained an order of said supreme court of the Territory of Arizona, at said January term thereof, granting said appeal and fixing the bond at $12,000, said sum of $12,000 being in a sum double the amount of the judgment rendered in said cause and costs:

Now, the condition of the above obligation is such that appellant shall prosecute his appeal with effect, and in case the judgment of the appellate court shall be against him that he shall perform its judgment, sentence, or decree, and pay all damages as may be awarded against him upon the appeal.

Witness our hands and seals this 19th day of March, 1897.

JAMES T. SIMMS, [SEAL.]
By CHARLES F. SIMMS, [SEAL.]
His Attorney-in-fact.
WM. CHRISTY. [SEAL.]
P. J. COLE. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Wm. Christy and P. J. Cole, the sureties whose names are subscribed to the foregoing bond, being severally sworn each for him

self and not one for the other, says that he is worth the
204 amount specified in said bond and for which he becomes responsible over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

WM. CHRISTY.
P. J. COLE.

Subscribed and sworn to before me this 19th day of March, 1897.

[SEAL.] THOS. D. BENNETT,
Notary Public.

My commission expires Sept. 13, 1899.

The above and foregoing bond is hereby approved this 19th day of March, 1897, both as to form and sureties.

OWEN T. ROUSE,
Presiding Judge

(Endorsed:) No. 552. In the supreme court of the Territory of Arizona. Bond on appeal to the Supreme Court of the United States. James T. Simms, appellant, *vs.* Hannah T. Simms, appellee. Filed March 20, 1897. J. L. B. Alexander, clerk.

205 In the Supreme Court of the United States.

JAMES T. SIMMS, Appellant,
vs.
Mrs. HANNAH T. SIMMS, Appellee.

Now comes the appellant above named and assigns *this* his errors for which this court should reverse the judgment of the court below:

First.

That the court errs in refusing to grant plaintiff a new trial.

Second.

That the court erred in refusing to grant plaintiff a divorce on the undisputed testimony in the case.

Third.

That the judgment for counsel fees and alimony is excessive, unjust, and contrary to law.

Fourth.

That the court below erred in not requiring the defendant,
206 she being a party to the action, to answer on cross-examination questions put to her by the plaintiff tending to disapprove the allegations in her cross-bill.

Fifth.

That the court erred in permitting defendant to attempt to establish the allegation in her cross-bill by supplemental affidavits after

she had attempted to dismiss said cross-bill and the testimony had been taken and submitted in the case.

PIERCE EVANS,
C. F. AINSWORTH,
FITCH & CAMPBELL,
Attorneys for Defendant.

(Endorsed :) No. 552. In the Supreme Court of the United States. J. T. Simms, appellant, *vs.* Hannah T. Simms. Assignment of error. Filed May 21st, 1897. J. L. B. Alexander, clerk.

207 In the Supreme Court of the United States of America.

JAMES T. SIMMS, Appellant,
vs.
HANNAH T. SIMMS, Appellee.

The President of the United States to Hannah T. Simms, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., within sixty (60) days from the date hereof, pursuant to an appeal allowed by the honorable supreme court of the Territory of Arizona on the 17th day of March, A. D. 1897, from a judgment rendered in the supreme court of the Territory of Arizona on the 23rd day of February, A. D. 1897, in an action pending in that court, wherein James T. Simms was appellant and Hannah T. Simms was appellee, to show cause, if any there be, why the judgment rendered against the said appellant, James T. Simms, should not be set aside, reversed, and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, chief justice of the
208 Supreme Court of the United States, this 15th day of April, A. D. 1897.

OWEN T. ROUSE,
Presiding Judge of the Supreme Court, Territory of Arizona.

I hereby acknowledge service of the foregoing citation this 17 day of April, A. D. 1897.

J. H. KIBBEY &
MILLAY & BENNETT,
Attorneys for Hannah T. Simms in this Cause in the Supreme Court of the Territory of Arizona.

209 [Endorsed :] Case No. —. In the Supreme Court of the United States. James T. Simms, appellant, *vs.* Hannah T. Simms, appellee. Citation. Lodged in my office this 16th day of April, 1897. J. L. B. Alexander, clerk supreme court of Arizona.

Endorsed on cover: Case No. 16,615. Arizona Territory supreme court. Term No., 128. James T. Simms, appellant, *vs.* Hannah T. Simms. Filed June 26, 1897.

A. H. GARLAND,
B. C. GARLAND,
For Appellants.

IN THE

Supreme Court of the United States.

JAMES T. SIMMS, *Appellant*,

vs. **No. 402.**

HANNAH T. SIMMS, *Appellee*.

Brief of Appellant in Opposition to Motion to Dismiss.

Accompaning this motion there is no part of the record printed and the court is left to search out, as best it may, the parts in the record which bear upon this motion. Under the rule and practice of this court, this motion to dismiss should not be noticed; but as it is here, and the matters set out in the motion will have to be considered first or last, a short response to it is here presented. In the first place, there is gross error in appellee's statement that the decree of the territorial court awarded appellee alimony and counsel fees, *pendente lite*; on the contrary, the suit was pending a long while and no mention is made of alimony and counsel fees, pending the suit, until the final trial of it, and then, suddenly, the decree of $7,250 was rendered, and in that decree was included the sum of $750, as alleged for alimony and counsel fees pending the suit. This is not alimony and counsel fees in any sense of the word.

In the second place, the statement that the matter in dispute does not exceed the sum of $5,000, would fool and mislead persons who had not examined the record; for the record shows that after the decree of $7,250 was entered, and after the appellant had prayed his appeal and the same was granted, and perfected in the court, the appellee came forward in a spirit of high christian liberality, and remitted the sum of $250. When the court will examine these facts, it will see at once that this was a bare-faced attempt to rape the appellate court of its jurisdiction.

The attempt then is made to beg the case away, because, under the act of congress, the jurisdiction here does not attain if the matter in dispute is less than $5,000. Really the matter in dispute in this suit was not a money demand, as contemplated by the act of congress. Alimony and counsel fees were a mere incident of the suit, and it appears here that they were entirely an after-thought, and the pretended claim they were given here to enable the wife to defend herself, is almost grotesque, for she, as the record shows, had the much larger property of the two; and it does not help the case at all to say the granting of alimony is discretionary with the trial court; because, if that were true, in its widest sense, that discretion is not an arbitrary one, but is a judicial discretion to be exercised in accordance with established rules wisely adapted to the facts apparent in each particular case, and when the discretion is abused, is a matter for which the appellate court will grant relief.

It can scarcely be necessary to cite authorities to support these propositions; but we will offer a few, so that we may not be considered as disrespectful to opposing counsel.

Mr. Bishop on Marriage and Divorce, sec. 394, says: "When the wife has sufficient separate property, the reason for giving her temporary alimony or suit money does not exist, and she is not entitled to either."

In Westfield *v.* Westfield, 36 N. J., Equity, page 195, the court, after quoting from Mr. Bishop, as above, on page 198, says: "When the wife has sufficient separate property, the reason for giving her either temporary alimony or money to defray her expenses of the suit does not exist, and she is not entitled to either."

And Judge Rapallo, in delivering the judgment of the Court of Appeals of New York in a recent case, says: "If the wife has sufficient means of her own, temporary alimony is not allowable. The fact that the wife is destitute of means to carry on the suit and support herself during its pendency is as essential as any other fact to authorize the court to award temporary alimony. It is not a mere matter of discretion, but a settled principle of equity."

Collins *v.* Collins, 80 N. Y., p. 1, on p. 12.

In Hadden *v.* Hadden, 18 Southern Reporter, p. 799, the court says on page 780: "The law seems to be well settled that two things must concur and must be made to appear before a court is justified in making any allowance to the wife in divorce proceedings for temporary alimony and for counsel fees. First, necessity therefor must appear on the part of the wife from her want of sufficient means to maintain herself during the litigation and with which to employ counsel. Second, and it must also appear that the husband has pecuniary means to supply that necessity." Citing:

Kenermer *v.* Kenermer, 26 Ind., 330.
Paite *v.* Paite, 41 Miss., 116.
Westerfield *v.* Westerfield, 36 N. J., Equity, 195.
Maxwell *v.* Maxwell, 28 Hun (N. Y.), 556.
Ross *v.* Ross, 47 Mich., 185.
Turner *v.* Turner, 22 Pacific, 72.
Chaires *v.* Chaires, 10 Fla., 308.
Underwood *v.* Underwood, 12 Fla., 434.

The court further says: "It is further well settled that the granting or withholding of such allowance is within the discretion of the court to whom the application therefor is made, but

this discretion is not an arbitrary one, but is a judicial discretion to be exercised in accordance with the established rules wisely adapted to the facts apparent in each particular case, and when the discretion is abused, is a matter from which an appellate court will grant relief."

The court in the case above cited further says: "That the court below having granted the plaintiff in this action, which was the wife, temporary alimony pending the litigation, that she, the wife, had equally as much, in fact considerably more, property and available means than her husband, the defendant, and that she acquired all of it from her husband, that the requisite necessity on her part for the allowance of temporary alimony and counsel fees was conclusively shown to be absent, and that her application therefore should have been denied. The court, therefore, ordered the decree allowing her temporary alimony to be reversed.

We submit that this case is on all fours with the one at bar. The record in this case shows that all the property of the plaintiff was heavily mortgaged, and that long before the alleged desertion, the defendant herself admits that she mortgaged a portion of her separate property to raise money for the plaintiff, which conclusively shows that the plaintiff was unable to raise any more money on his property, and we submit that this judgment for alimony and suit money should be reversed and set aside. Again, when money is raised by the wife on her own credit it is not reimbursable *pendente lite* at the court's discretion.

Loveren *v.* Loveren, 35 Pac. R., 87.

The record further shows that at the time the defendant married the plaintiff the plaintiff was worth $40,000; that afterwards in some of his undertakings as he says, he "went broke," but at the time he came to Arizona he was worth in his own right $25,000 or $30,000.

The reference to *Barber v. Barber, 21 How., 582*, as showing that this court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony either as an original proceeding in chancery, or as an incident to divorce *a vinculo*, or to one from bed

and board, has no bearing here, for that has reference entirely to United States courts proper in the States, and has no reference, or could have none, to the territorial courts.

Then we are in conclusion served again with the delicious *morceau* that $250 was remitted, and therefore there is no jurisdiction. This release or attempted release, was made after the case was closed, and after it had been appealed in due form of law, and it is respectfully submitted, the jurisdiction of that court ended for all purposes; the jurisdiction had attached in the appellate court, and the supposed order granting the release was absolutely void.

Keyser *v.* Farr, 105 U. S., 265, *et seq.*, which is especially in point.

Coates *v.* Wilkes, 94 N. C., 174.

Stone *v.* Spillman, 16 Tex., 432.

Levi *v.* Karrick, 15 Iowa, 444.

Penrice *v.* Wallis, 37 Miss., 172.

Skinner *v.* Bland, 87 N. C., 168.

We beg leave to submit a portion of the dissenting opinion of Judge Rouse, upon this branch of the case, as being perfectly conclusive, and we deem any further argument as superfluous.

To the judgment of this court affirming the said judgment of the district court, allowing said sum for counsel fees and the allowance to defendant of $150 per month from December 14, 1893, as alimony, I dissent.

It appears from the record that the defendant has no children, or any one dependent upon her for support; that long before there was any move on the part of plaintiff toward an effort to secure a divorce, a division of plaintiff's property was made with defendant, so that, by good and sufficient instruments, what was considered by both parties to be one-half of all his possessions was

transferred to her. By said transaction defendant received real estate from plaintiff proven on this trial to be worth at the date of the trial something over $40,000. That said property was her separate property, and under her control from the date when so conveyed to her, and from that time to the date of the trial. Said division of the property was made with the express purpose of disposing of the community property, and to make full preparations for the preservation of the wife's rights.

The statute of this territory provides:

"If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case."

R. S. of 1887, paragraph 2120.

That statute gives the judge or court, pending the action, certain power. This power of the judge or court depends, first, upon the fact that the wife has not a sufficient maintenance; second, after due notice has been given; third, the allowance must be in proportion to the husband's means; fourth, the allowance can only be until the suit is terminated.

The complaint in the case at bar was filed October 9, and the answer thereto October 18, 1894.

No motion for alimony was made by defendant until April 2, 1896, nearly eighteen months after issue was joined. On that date her motion was made and notice served on plaintiff and counter affidavits were filed, but no order was made with reference thereto, and nothing done thereon until the date of the final judgment, June 6, 1896, and then only in the final judgment.

The power to grant alimony is pending the action for divorce, not at the time when the divorce is refused and case is dismissed. It is an allowance for the wife's support, and to provide her with the means to prosecute the action or make her defense.

R. S., paragraph 2120.

She had maintained herself and had been represented by a number of distinguished attorneys from the begininng. The suit was at an end when the judgment for an allowance was made.

Again, the record shows that defendant owned property in her own right, acquired from plaintiff, of equal value to that which he owned, of the value of over $40,000, which was productive. Before alimony can be allowed, it must be shown that the wife has not sufficient income for her maintenance during the pendency of the action.

Paragraph 2120, *supra.*
Bishop, Marriage and Divorce, sec. 394.
Collins *v.* Collins, 80 N. Y., 12.

The judgment in this case for alimony was at the time the divorce was refused; it was not pending the action.

The judgment then was a money judgment in favor of the wife, to be enforced against her husband by an execution, notwithstanding the fact that she was possessed of large means, and was robed during the pendency of the suit with the marital right to draw on her husband's credit for her support, and notwithstanding the fact that she may have secured a maintenance in that way during that time. The allowance was $150 per month for a period from December, 1893, up to the date of the judgment; covering a period of nearly a year before the suit was filed; covering a period when only the mutterings of a threatened domestic storm was approaching, but when no storm was actually raging.

The judgment for alimony was for a sum over $5,000, of which $750 was for counsel fees.

The statute only authorizes the court to make an allowance to the wife for her maintenance during the pendency of the suit; the allowance cannot be made after the suit is terminated. The allowance can only be on motion made after notice, not before, and certain conditions must be shown to exist before the order can be made. In this case the motion was made and notice given but no order was made. The action is for a divorce, and not an action for a division of the property between plaintiff and defendant, or for a personal judgment between them. The divorce being refused, the parties remained husband and wife, with all the rights of such, and governed by all the laws pertaining to the marital relation. The only judgment that could be pronounced in this case, on the refusal of the divorce, was a judgment for costs. If the court had, prior to that time, made an order allowing the wife support, etc., and said order had not been complied

with, it would have had power to have enforced said order; but it had no power to enter the judgment for allowance, which was entered. That judgment, as has been stated, reaches back to a time when there were no domestic troubles, and, in effect, regulates the domestic affairs of the parties at a time when they were not before the court.

By statute it is provided:

"The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property."

R. S. 1887, paragraph 2114.

If a divorce had been granted in the case at bar, the court could have divided the community property between the parties, as would have been just and right, but could not have interfered with their separate property.

It is further provided:

"The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable."

R. S. of 1887, paragraph 2122.

There are no other provisions of the statutes applicable to the case at bar, and hence we hold that the only judgment the court could render was a judgment for costs of the suit.

The judgment was entered in this case on the 13th day of June, 1896, for the sum of $5,235, exclusive of costs, and the motion for a new trial and to set aside said judgment, was overruled and denied on June 29, 1896. Thereafter, on June 30, 1896, plaintiff filed an appeal bond in the sum of $11,000, which was duly approved, and appeal granted. Thereafter, on the 15th day of July, 1896, defendant gave notice to plaintiff that on July 27, 1897, she would apply for an order for alimony, pending the appeal of said case, and on said date last mentioned the judge made a decree, ordering and adjudging that plaintiff pay to defendant, within ten days, $250 for her support, as alimony at the

rate of $150 per month from the date of the said former decree, viz, June 13, 1896; and the further sum thereafter of $150 per month in advance, from the 1st day of August, 1896, during the pendency of the action; and the further sum of $500 as counsel fees.

Thereafter, in the supreme court, the appellee, defendant below, on the 27th day of January, 1897, filed in the supreme court her motion, prepared on January 23, 1897, for an order dismissing said appeal, for the reason that appellant had not complied with the decree and order last above referred to, and on the same date, viz, January 27, 1897, her attorneys, Messrs. Kibbey, Barnes, Millay, and Bennett, filed a motion to remit all of the judgment of the district court for alimony and attorneys' fees, in excess of $5,000, to-wit: the sum of $250.

It will be observed that at the date of the judgment the amount decreed in favor of defendant was $5,250; that plaintiff perfected his appeal on June 30, 1896; that thereafter the court decreed that plaintiff should pay defendant $150 per month; that $250 was due to August 1, 1896; that in addition thereto he was to pay her $500 for counsel fees. Due at the date of said motion, viz, January 27, 1897:

Original judgment	$5,250.00
Alimony to August 1, 1896	250.00
Alimony per month thereafter to February 1, 1897	900.00
Counsel fees	500.00
Making in all	$6,900.00

The bond on appeal was both an appeal and a stay bond. After it was executed, approved, and filed, the appeal was complete, and the district court no longer had jurisdiction of the case.

R. S. of 1887, paragraph 865.

The case then was under the jurisdiction of the supreme court on appeal, and said court had jurisdiction of the case, as it was on the date the final judgment was entered by the district court.

"Any party in whose favor a verdict or judgment has been rendered may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and

entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted."

R. S. of 1887, paragraph 817.

It is evident from said paragraph and from the remaining paragraphs of the chapter of the statutes to which it belongs, that the remitter can only be entered in the district court, and only in that court before an appeal has been perfected, excepting as is provided by the following:

"If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court, in the same manner as such release is required to be made in the district court; * * *"

The course to be pursued in entering a remitter not in term time, is pointed out and directed by paragraph 818, R. S. of 1887. That course was not pursued in this case, and even if the case at bar was such in which a remitter could be entered, the appellee failed to pursue the course prescribed by law and the judgment has to remain as it was entered in the district court.

It will be observed, however, that the right to remit is given only to a plaintiff. It is evident that the right is given to one who has instituted a suit to recover a money judgment or property of a certain value, that he may make a verdict or judgment which is in excess of the amount claimed, a valid verdict or judgment by having them correspond with the allegations of the complaint, or to correspond to the evidence on the trial. In the case at bar, the judgment was for $5,250; to secure an appeal and a stay of the judgment, plaintiff was required by law to execute a bond for at least double that sum. A bond in a smaller sum would not have stayed the execution.

The right of appeal from the district to the supreme court, is fixed on a value of the matter in controversy, at $200. Suppose the judgment of the district court exceeds that sum and an appeal is taken, can it be successfully maintained, that after the appeal

has been perfected, the appellee can destroy the jurisdiction of the supreme court by entering a remitter so as to bring the amount just under $200?

Again, suppose a suit should be instituted in a court for a sum in excess of the jurisdiction of said court, could jurisdiction be retained by the plaintiff, after judgment, remitting all in excess of the jurisdictional sum? We contend that a remitter can only be made to correct an error in the verdict or judgment, by reason of the fact that the verdict or judgment is in excess of the amount claimed, or that the evidence does not support the verdict or judgment.

It is apparent that in the effort to remit the insignificant sum of $250 that it was the purpose of appellee to prevent the case from going to another tribunal for review, by having the judgment reduced to just $5,000. As stated before, this is not an action for a money judgment. The money part of the judgment is a mere incident. It was imposed, in our judgment, without any legal authority, hence we think the judgment should be reversed, and the case dismissed.

O. G. ROUSE,
Associate Justice, Supreme Court.

Very respectfully submitted,

A. H. GARLAND,

R. C. GARLAND,

For Appellant.

No. 16.

FILED
OCT 10 1899
JAMES H. MCKENNEY,
Clerk.

Brf. of Payson for Appts.

Filed Oct. 10, 1899.

Supreme Court of the United States.

CHARLES F. SIMMS, GEORGE T. BROWNE, Executors of the Will of James T. Simms, Decd., *Appellants*,

vs.

HANNAH T. SIMMS, *Appellee*.

No. 16

Brief for Appellants.

L. E. PAYSON,
For Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

CHARLES F. SIMMS, GEORGE T. BROSIUS, Executors, &c., *Appellants*, vs. HANNAH T. SIMMS, *Appellee*. } Appeal from the Supreme Court of Arizona.

BRIEF FOR APPELLANTS.

This was an action for a divorce, on a complaint filed by James T. Simms (now deceased, and for whom, as personal representatives, present appellants of record have been substituted), against appellee.

The complaint, charging desertion as a cause, was filed October 6, 1894, and avers that all the property owned by them was held severally, as the separate property of each.

The answer by appellee was filed October 18, 1894; it makes a general denial of the complaint, and is accompanied by a cross-bill alleging extreme cruelty; that in 1886 a homestead of 40 acres was selected out of their "community property," and, in June, 1889, an agreement was made between them for a division of all the other of the common property.

Nothing else in the cross-bill is deemed material here, beyond these dates, as the cross-bill was dismissed during the first taking of evidence; no date is given as to this but it was prior to June 12, 1895. (Trans., p. 45).

The referee was appointed April 17, 1895. The report of the evidence taken begins on page 19; about one day's work appears, when an adjournment was taken. (Trans., p. 45.) The parties met on June 12, 1895, and without any progress adjourned to June 17, 1895, when the "case was submitted." (Trans., p. 47.)

The case then proceeded on the bill, alleging desertion the general answer, replication and proofs; as also an application for alimony *pendente lite*, made on April 2, 1896, for "the sum of $5,000 as provisional alimony to enable this defendant to employ counsel and defend the above action."

This motion for temporary alimony shows an appearance by five attorneys for appellee for that purpose, and was accompanied by an affidavit of Mrs. Simms, that her husband has not since the suit, nor a long time prior thereto, contributed to her support.

She has 160 acres of land in Arizona, only; encumbered yielding no income; she has been compelled to mortgage it to pay interest and taxes; she is without means of support or to pay counsel, as she cannot further mortgage her land, or sell it; that her husband is abundantly able, etc. (Trans., pp. 57, 58.)

On April 4, 1896, Mr. Simms made his showing as to said motion and affidavit (Trans., p. 59) that the 160 acres of land Mrs. Simms had was derived from him, and worth $300 per acre, or $48,000, encumbered for only $8,000; sets out his financial condition as largely inferior to hers; that she has employed six attorneys, and no demand ever made on him for alimony until April 2, 1896.

A confirming affidavit by one Pickrell (p. 60) and counter affidavit by Mrs. Simms (p. 61) makes the record as to the application.

The application was not pressed in Court.

On June 6, 1896, the cause was heard on evidence taken by the referee, and a decree entered dismissing the bill of complaint; that defendant " is entitled to $750 counsel fees, and $150 per month for her maintenance since December 14, 1893, and judgment is ordered accordingly. (Trans., pp. 65, 76.) The formal opinion of the Court is found on that page also. Judgment formally entered of record, June 13, 1896.

June 8, 1896, a motion for new trial made, and grounds assigned, specially, 2d, that the judgment is contrary to the law; 3d, that the evidence does not sustain the judgment; and 4th, that the judgment for alimony is unjust and contrary to law. (Trans., p. 75.)

Motion for new trial overruled June 26, 1896. (Trans., p. 76.)

An appeal was duly prosecuted to the Supreme Court of the Territory and errors assigned. (Trans., p. 83.)

Specially urged were the points that no alimony should have been granted, as defendant had ample property to support her in her position in life; property of the value of $40,000, and that the monthly allowance in any event ought not to begin with December 14, 1893.

It may be stated here that the amount decreed by the District court on June 13, 1896, upon computation amounts to $5,250 exclusive of the costs.

While the case was pending on appeal in the Supreme Court of the Territory, on January 26, 1897 (Trans., p. 85), appellee filed an attempted release or remittance from the judgment of the District court of all in excess of $5,000, viz, $250. This move does not appear to have been followed up.

On February 23, 1897, in the Supreme Court, the decree and judgment of the District court for $5,250 and costs was affirmed. (Trans., p. 93.)

This was accepted by appellee, no notice being called to the attempt to remit, and the full judgment stands.

On March 16, 1897, a motion for a rehearing, upon the same points presented in the appeal, was made; on March 17, 1897, denied; an appeal to the Supreme Court of the United States allowed. (Trans., pp. 95, 96.)

The usual errors are assigned, but the only one urged here—because of the death of Mr. Simms—is as to the allowance of the "provisional alimony"—that it was unjust; it was contrary to law, and it was excessive.

On October 19, 1898, in this Court, a motion to dismiss the appeal was made by appellee on the ground that the proceeding being for a divorce, the judgment appealed from does not come within the statute allowing appeals "in suits at law or in equity in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars."

This motion does not appear to have been acted upon, and so, as it involves one of the principal questions in the appeal, we assume that the case will be taken by the Court and considered as presented.

ARGUMENT.

We submit that this allowance of alimony was wholly unwarranted upon the record.

The law upon the subject of the granting of alimony is elementary.

No question of a permanent allowance is presented, because the bill of complainant was dismissed, and because, as the record shows, the application of appellee, on which the allowance complained of was made (Trans., p. 57), asks for "the sum of $5,000 as provisional alimony to enable the defendant to employ counsel and defend the above action."

This was on April 2, 1896; the bill was filed October 6, 1894; answered October 18, 1894; referee appointed April 17, 1895; proofs before him taken in two actual days, and ended on June 17, 1895. Pending the taking of these proofs and before June 12, 1895, appellee's cross-bill was dismissed.

This application for alimony was not pressed nor acted on in court as a pending matter, for an allowance *pending* the suit.

The final hearing was had on June 6, 1896, and on that day a decree made dismissing the bill and making this allowance *on this application* of $5,250, of which $750 was to enable her to procure counsel to defend the suit!

In the absence of a statute upon the subject so providing, the allowance of alimony *pendente lite* is not a matter of right. Where a statute exists it, of course, regulates and determines the right of the wife.

Par. 2120, R. S. Arizona, 1887, provides:

"If the wife, whether complainant or defendant, has not sufficient income for her maintenance during the pending of the suit for divorce, the judge may either in term time or vacation, *after due notice*, allow her a sum for her support in proportion to the means of her husband, *until a final decree* shall be made in the case."

The italics are mine.

There is a clearly defined procedure outlined, as to certain conditions; a wife without sufficient income for her support, may make her petition, and *after due notice*, the judge may make a proper allowance, *until* the final decree.

If she desires an early allowance, she must make seasonable application; the diligence is for her, and the allowance can only be for the term, *after* due notice, and *until the final decree.*

Again, the statute in terms provides for the allowance in any contingency, *only* "during the pendency of the suit."

"If the wife * * * has not sufficient income for her maintenance during the pendency of the suit," says the statute; but here, although the bill was not filed until October 6, 1894, the order of the court made the allowance of $150 per month to begin December 14, 1893. (Trans. pp. 63, 65.)

This was for *ten months* before any suit was pending.

Could it be reasonably contended, that if, when the answer was filed October 18, 1894, a petition for alimony under the statute had been presented, due notice given, and affidavits, *pro* and *con* been submitted, that in any event, the allowance could have ante-dated the suit? Surely not, and yet here, at the time of final decree, the allowance is made to ante-date the suit nearly ten months, carrying nearly $1,500 to enable the wife to defend the suit, before it was begun.

We submit, that under this statute, the power to grant alimony is "pending the suit," and not when the suit is dismissed, refusing the divorce.

Illustrating the absurdity of this decree, remembering that appellee had in some way maintained herself during the pendency of the suit, and had secured and had the services of five, and part of the time six, distinguished attorneys from the beginning, suppose both parties had accepted the decree dismissing the bill, and resumed marital relations.

The wife, collecting this $5,250, would have had it not for support and maintenance "pending the suit," but as a bonus, a separate estate of her own, to be used as she pleased, while her husband was supporting and caring for her.

A careful examination of decided cases fails to show a

single case where an allowance of alimony, *pendente lite*, was made to begin before suit was instituted, and it is therefore insisted, upon reason and authority, that this phase of the allowance was clearly error, for which the judgment should be reversed.

The authorities are, that where a wife has succeeded in supporting herself and in making her defense, she is not entitled to an allowance for past expenses and counsel fees.

In Underwood *vs.* Underwood, 12 Fla., 444, it was said:

"*Ad interim* alimony, and the amount necessary to meet the expenses of the suit, are given, not as a matter of strict right in the wife, but as a matter of sound discretion for the court, * * * that discretion to be formed from an equitable view of the whole case. These expenses were not allowed in the court below, until the final decree in the case. "In *such* cases, independent of the statute, the rule is, the husband is not liable for these expenses."

Again, on p. 448, it is said,

"In the case in 3 Phillimore, 394, the precise question was, an allotment of alimony *pendente lite*, where it was two years before the wife applied, and in a case of great outrage upon the wife. The High Court of Delegates upon an appeal from the Consistory Court say, 'Considering that the wife was two years before she applied for alimony, we shall be disposed not to carry the grant back, but make it merely prospective.'"

So if the application is postponed until the hearing or decree, no allowance can be made unless the wife obtain a divorce.

In Collins *vs.* Collins, 10 Hun., 275, the question was, whether an order for temporary alimony should be made retroacting, as to time between the notice of the motion and the hearing, several years.

The Court say: "The plaintiff has supported herself

through these intervening years, and if she has become dependent again upon the property of her husband the allowance should not exceed what her present necessities require. The object is not to make provision for the past, but to maintain and support her, until, with the observance of reasonable expedition, her action may be determined. Page 276, "The husband should provide for plaintiff's present necessities."

In Thrall *vs.* Thrall, 83 Hun., 188, it is said,

"It seems settled by authority that the allowance of alimony *pendente lite*, can as a rule, be made only for future support, and should commence only at the time of notice of an application for its payment."

Citing: Collins *vs.* Collins, 10 Hun., 275;
Beadleston *vs.* Same, 103 N. Y., 402;
McCarthy *vs.* Same, 137 N. Y., 500.

In Beadleston *vs.* Same, 103 N. Y., 402, speaking of the purpose of the law in permitting allowances, *pendente lite*, the Court say, page 405:

"The allowance looks to the future. There can be no necessity for an allowance to make a defense already made, solely to pay expenses already incurred." "If she has succeeded in making her defense upon her own means, or upon her own credit, she cannot before judgment and while the action is pending have an order compelling her husband to pay such expenses. An allowance for past expenses *might* be authorized *if it were shown* that its payment was necessary to enable her to further carry on the action, or her defense thereto."

The italics are mine; of course, no pretense can be made here, that the contingency suggested is in this case.

In the case of McCarthy *vs.* Same, 137 N. Y., 500, the Court say:

"The statute is, during the pendency of the action the court may order the husband to pay any sum of money

necessary to enable the wife to carry on or to defend the action."

"An allowance may not be made to defray expenses already incurred, unless it is made to appear that their payment is necessary to enable the wife to further prosecute or defend."

Page 503:

"The allowance looks to the future, in the litigation, not for reimbursement, or to provide for future needs after the end of the litigation."

It is submitted earnestly that the whole current of authority is exactly in line with this authority. Applying the rules to the case at bar, we have a suit perfectly simple, involving only one question, viz, whether a refusal of a wife to leave a comfortable home, notwithstanding unpleasant relations with adult stepsons, and to go with her husband to an hotel, undesirable to her, but perfectly satisfactory to him, constituted a desertion or abandonment of the husband, so as to entitle him to a divorce. No other question in the case on the merits. Her cross-bill she had dismissed; all the evidence, the little there was, and of no complication whatever, was all in; she had supported herself so far, and so far as appears without difficulty.

She received the valuable farm of 160 acres, near Phœnix, valued by most of the witnesses at $300 per acre=$48,000, in 1889. On this she obtained by mortgage $4,500 in two mortgages subsequent to the separation, December 14, 1893 (Trans., p. 38), so that she had $4,500 in cash, and the equity in this property after they ceased living together; moreover, she had her home in his house without expense.

She *had* "succeeded in making her defense from her own means, or upon her own credit," and for aught which appears in this record, owed no one a dollar, either for sup-

port or counsel fees. Therefore the allowance by the court below was *wholly* reimbursing, and therefore unwarranted.

One item in the McCarthy case (137 N. Y. *supra*) was unpaid counsel fees, "what he, the attorney has charged the plaintiff, besides disbursements." Yet the court say—

"The allowance of such an item is unauthorized.

"It is apparent in this case that the wife had conducted the litigation out of her own means, or upon credit, from its commencement to a point where the case was closed, and nothing remained but an entry of judgment upon the referee's report."

(Exactly this case.)

"It did not appear that the wife still needed money to carry it on." So the allowance was refused, as it should have been here.

In Loverin *vs.* Loverin, 35 Pac. Rep., 87, the Court say:

"If the expenses of the action have been incurred or paid by her, with means derived from her separate estate or upon her credit, there can be no necessity for an allowance by the court to enable her to do that which she has already done. Without such necessity the court has no authority to make such an order." "When money is raised by the wife on her own credit, it is not reimbursable *pendente lite*, at the court's discretion, as money necessary to enable her to prosecute her action."

No better evidence of appellee's ability to mature her case to the point of a final hearing and decree can be had than the fact that she *did* so; and hence there was no necessity for an allowance *pendente lite*.

Moreover, be it observed, she only asked for provisional alimony to enable her "to employ counsel and defend the action;" this had already been accomplished, and she asked nothing for maintenance or support.

It seems to have been an arbitrary act on the part of the Court, speaking respectfully, for nothing appears in the

record that the motion, such as it was, was being pressed, even by counsel, who would be benefitted.

The decree recites (Trans., p. 65), that the cause came on for hearing, having been referred to a referee to take testimony, *which* having been taken, and *the same* having been argued by counsel to the court, and *the same* having been considered, "it is ordered," etc. That is, upon the pleadings remaining, and the testimony taken by the referee. In all this not a word appears as to the necessary expenses of appellee, or necessary or reasonable counsel fees; nor of the application for an allowance. We have the right to ask, upon what did the court base its judgment that $150 per month was a proper allowance for the then past two years and six months, from December 14, 1893, to June 13, 1896?

That the order made was to reimburse her, is perfectly evident, from the opinion of the Court. On page 66 the Court says, "*At the trial,* defendant filed motion for alimony and counsel fees, *pendente lite.*"

On page 74 of the Transcript, the Court says, "It appears on the hearing of the case that plaintiff has not provided anything for the defendant since their separation. She has also had to pay her numerous counsel to defend her rights. I do not think it necessary to make provision for the payment of all these counsel, as she had three firms employed. She is, however, entitled to a reasonable compensation for her counsel, and to a reasonable support pending this action." Then follows the order for $150 per month *since the separation,* and $750 to defendant for counsel fees.

Not a word in evidence, nor a finding by the Court as to what she had paid or agreed to pay as counsel fees; nor a word of evidence or finding by the Court as to what she had paid or agreed to pay for support since the institution of the suit.

More important, if possible, was the failure to find and determine the needs of the wife, based upon *her* financial condition, as compared with his, and the necessity of calling upon him because of her lack of resources. The law is perfectly clear upon this point, as shown by cases cited.

That this order was the exercise of a purely arbitrary judgment, is apparent from the amount of the allowance.

The wife was of middle age, lived " in the house on Center St., large house with all the comforts."

" The most attractive place about Phœnix." (Trans., p. 26.)

She had this free of rent, so that her sole personal expenses, in any event, would be all she could ask, if she had no resources of her own, and her application made in apt time. Eighteen hundred dollars a year for that purpose strikes the mind as anything but just.

Moreover, she had, as shown by the record (Trans., p. 38), $4,500 in cash, of her own, after the separation in December, 1893.

Equally subject to criticism is the allowance for counsel fees. The allowance, on its face, was intended not for reimbursement wholly, for the Court says it was not necessary to make provision for the payment of all she had employed, but as she " had to pay " those employed, the Court arbitrarily fixed $750, as reasonable reimbursement, toward what she had paid, without any proof whatever as to either the amount paid to all, or what would be reasonable to those she would be justified in engaging, if the husband were chargeable. The amount was grossly excessive, if based upon the idea of reasonable expenses. Not a complication in the case calling for more than the most ordinary effort; not a dispute of fact on the main question of desertion; only a simple question of law, whether the refusal of the wife to go to the hotel to live constituted " de-

sertion." It would be a poor compliment to any one of the distinguished counsel to say he could not alone do the work as well as all; and it is not deemed improper to predict that competent counsel would readily be found who would gladly perform necessary professional work in such a case for $250.

As stated above, it is assumed that one of the questions which will be presented by appellee is whether this Court has jurisdiction of the case, upon the ground that appeals to this Court are limited to "suits at law and in equity in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars," and that for two reasons the jurisdiction of this Court will not attach; because, (*a*) an allowance of any sum of money, *pendente lite*, in a divorce proceeding, being an incident to the principal controversy, viz, a continuance or dissolution of the martial relation, is not a "matter in dispute" in the litigation as to which the action of the Court below may be reviewed on appeal; and, (*b*) that appellee, having filed the supposed remitter of $250 in the office of the clerk of the Supreme Court on January 26, 1897, cut off the right of appeal to this Court, if it existed.

The final judgment in the District Court was on June 13, 1896.

The appeal from that court to the Supreme Court was perfected by the filing and approval of the usual bond June 30, 1896. (Trans., pp. 81, 82.)

The deeree of affirmance in the Supreme Court was on February 23, 1897; it was not only an affirmance, but also a formal judgment for $5,250 and costs, and ran against the sureties as well as the principal in the bond; *this* is the judgment appealed from, to this Court. (Trans., p. 93.)

Reference will be made, doubtless, to Barber *vs.* Barber, 21 Howard, 582, as showing that this Court disclaims jurisdiction in the courts of the United States upon the subject of divorce or any incident thereto, but of course, that has reference entirely to the courts of the United States in the States, and has no reference nor could have any to the Territorial courts.

As to the first question (*a*) whether this judgment appealed from, for $5,250 and costs was such a "matter in dispute" as that it could be reviewed on appeal here, seems perfectly clear, both on principle and authority.

The contention of appellee is, that the allowance of temporary alimony in a divorce proceeding is a mere incident to the proceeding; "probably to be regarded more as costs in the case," and that the action of the judge of the trial court, in allowing it, is so much an arbitrary exercise of power, though called "a discretion," that it cannot be reviewed by a superior tribunal.

I do not think so.

While the allowance of alimony is a matter for the "discretion" of the trial court, it is always to be taken as a *sound, judicial* descretion, to be exercised after a full consideration of all presented facts, affirmed or denied, precisely as in the determination of every question presented to a judicial tribunal.

There must be a judicial ascertainment of two facts, before such an allowance can be made, first, necessity therefor on the part of the wife must appear, from her want of sufficient means to maintain herself during the litigation, and with which to employ counsel.

The *fact* that the wife is destitute of means to carry on the suit and support herself during its pendency, is as essential as any other fact to authorize the Court to award temporary alimony; because, if the wife has sufficient separate prop-

erty, the reason for giving her alimony to defray the expenses of her defense does not exist, and she is not entitled to it.

Westfield *vs.* Westfield, 36 N. J., Equity, 195.

When the wife has sufficient separate property, the reason for giving her temporary alimony, or suit money, does not exist and she is not entitled to either.

Bishop, M. and D., sec. 394.

Second: it must also appear that the husband has pecuniary means to supply the necessity found to exist as stated.

These two conditions must be judicially ascertained before a temporary allowance can be made.

See Hadden *vs.* Hadden, 18 Southern Rep., 779, and cases cited.

In this case it is said, "It is further well settled that the granting or withholding of such allowance is within the discretion of the court, to whom the application therefor is made; but this discretion is not an arbitrary one, but is a judicial discretion, to be exercised in accordance with the established rules, wisely adapted to the facts apparent in each particular case, and when the discretion is abused is a matter from which an appellate court will grant relief."

Citing Cooke *vs.* Cooke, 2 Phill., sec. 40.

"That she, the wife, had equally as much, in fact considerably more property and available means than her husband, and that she acquired all of it from her husband, that the requisite necessity on her part for the allowance of temporary alimony and counsel fees was conclusively shown to be absent, and that her application should, therefore, have been denied."

The decree below was reversed. This case of Hadden is exactly like the case at bar.

In Cooke *vs.* Cooke, 2 Phill., 40, it is said :

"Alimony is discretionary with the court, but it is a judicial and not an arbitrary discretion which is to be exercised, and therefore clearly the subject of appeal."

Perhaps the best expressed exposition of the law on this phase of this case is found in the opinion in Leslie *vs.* Leslie, 6 Abb. P., N. S., 196.

"Any order or judgment which imposes upon a party such a charge as the payment of money, not as a condition upon which some favor or relief is granted to him, to which he is not entitled as a matter of right, but which is imposed upon him absolutely, as an obligation, and which may be enforced by execution, or summarily against his person, affects a substantial right, if he ought not to pay it, or if a greater amount is imposed than he ought to be subjected to. Such an order is not in the sole discretion of the judge who makes it, but is the exercise of a legal discretion, which, if erroneous, may be reviewed and corrected.

Orders for the payment of alimony and counsel fees come under this class—

1. For the reason that they peremptorily impose upon the husband the payment of money.

2. Because the allowance of temporary alimony by a court of equity is subject to certain rules which have been long recognized and acted upon.

3. It has always been held that such orders are reviewable."

It only remains to notice the second question (*b*), viz, whether by the filing of the supposed remitter of $250 in the office of the Clerk of the Supreme Court on January 26, 1897, thus attempting on that date to limit the amount to be collected to $5,000, the right of appeal is cut off by that attempted reduction.

The decree of the District Court was appealed from and perfected by the approval of the bond on June 30, 1896.

This ended the jurisdiction of that court in the case, at most, on the adjournment of the term. No steps were taken further in that court, but, pending the perfected appeal in the Supreme Court, this remitting was attempted.

A complete answer to this attempt to remit is found in the dissenting opinion of Mr. Justice Rouse of the court below, which I print herewith and as part of this argument. The case itself does not appear to be reported as yet, so I file a certified copy of that opinion as well.

It may be added, however, that the remitter was not only not pressed upon the Supreme Court, but that the judgment of affirmance was rendered after its filing, and was for the full sum appealed from, $5,250, and costs of suit, so that if that record and judgment shall stand, execution will of course issue for the full sum. (Trans., p. 93.)

That is *the* judgment appealed from; the one which will be collected if affirmed here, necessarily and therefore the amount over which we are contending here—"the matter in dispute" under the statute, is $5,250, as of February 23, 1897, and costs of suit.

The following is so much of the dissenting opinion of Mr. Justice Rouse, as pertains to the questions here:

> "To the judgment of this court affirming the said judgment of the district court, allowing said sum for counsel fees and the allowance to defendant of $150 per month from December 14, 1893, as alimony, I dissent.
>
> It appears from the record that the defendant has no children, or any one dependent upon her for support; that long before there was any move on the part of plaintiff toward an effort to secure a divorce, a division of plaintiff's property was made with defendant, so that, by good and sufficient instruments, what was considered by both parties to be one-half of all his possessions was transferred to her. By said transaction defendant received real estate from plaintiff

proven on this trial to be worth at the date of the trial something over $40,000. That said property was her separate property, and under her control from the date when so conveyed to her, and from that time to the date of the trial. Said division of the property was made with the express purpose of disposing of the community property, and to make full preparations for the preservation of the wife's rights.

The statute of this territory provides:

'If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case.'

R. S. of 1887, paragraph 2120.

That statute gives the judge or court, pending the action, certain power. This power of the judge or court depends, first, upon the fact that the wife has not a sufficient maintenance; second, after due notice has been given; third, the allowance must be in proportion to the husband's means; fourth, the allowance can only be until the suit is terminated.

The complaint in the case at bar was filed October 9, and the answer thereto October 18, 1894.

No motion for alimony was made by defendant until April 2, 1896, nearly eighteen months after issue was joined. On that date her motion was made and notice served on plaintiff and counter affidavits were filed, but no order was made with reference thereto, and nothing done thereon until the date of the final judgment, June 6, 1896, and then *only in the final judgment.*

The power to grant alimony is pending the action for divorce, not at the time when the divorce is refused and case is dismissed. It is an allowance for the wife's

support, and to provide her with the means to prosecute the action or make her defense.

R. S., paragraph 2120.

She had maintained herself and had been represented by a number of distinguished attorneys from the beginning. The suit was at an end when the judgment for an allowance was made.

Again, the record shows that defendant owned property in her own right, acquired from plaintiff, of equal value to that which he owned, of the value of over $40,000, which was productive. Before alimony can be allowed, it must be shown that the wife has not sufficient income for her maintenance during the pendency of the action.

Paragraph 2120, *supra.*
Bishop, Marriage and Divorce, sec. 394.
Collins *v.* Collins, 80 N. Y., 12.

The judgment in this case for alimony was at the time the divorce was refused; it was not pending the action.

The judgment then was a money judgment in favor of the wife, to be enforced against her husband by an execution, notwithstanding the fact that she was possessed of large means, and was robed during the pendency of the suit with the marital right to draw on her husband's credit for her support, and notwithstanding the fact that she may have secured a maintenance in that way during that time. The allowance was $150 per month for a period from December, 1893, up to the date of the judgment; covering a period of nearly a year before the suit was filed; covering a period when only the mutterings of a threatened domestic storm was approaching, but when no storm was actually raging.

The judgment for alimony was for a sum over $5,000, of which $750 was for counsel fees.

The statute only authorizes the court to make an allowance to the wife for her maintenance during the

pendency of the suit; the allowance cannot be made after the suit is terminated. The allowance can only be on motion made after notice, not before, and certain conditions must be shown to exist before the order can be made. In this case the motion was made and notice given but no order was made. The action is for a divorce, and not an action for a division of the property between plaintiff and defendant, or for a personal judgment between them. The divorce being refused, the parties remained husband and wife, with all the rights of such, and governed by all the laws pertaining to the marital relation. The only judement that could be pronounced in this case, on the refusal of the divorce, was a judgment for costs. If the court had, prior to that time, made an order allowing the wife support, etc, and said order had not been complied with, it would have had power to have enforced said order; but it had no power to enter the judgment for allowance, which was entered. That judgment, as has been stated, reaches back to a time when *there were no domestic troubles*, and, in effect, regulates the domestic affairs of the parties at a time when they were *not before the court.*

By statute it is provided:

'The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property.'

R. S. 1887, paragraph 2114.

If a divorce had been granted in the case at bar, the court could have divided the community property between the parties, as would have been just and right, but could not have interfered with their separate property.

It is further provided:

'The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable.'

R. S. of 1887, paragraph 2122.

There are no other provisions of the statutes applicable to the case at bar, and hence we hold that the only judgment the court could render was a judgment for costs of the suit.

The judgment was entered in this case on the 13th day of June, 1896, for the sum of $5,235, exclusive of costs, and the motion for a new trial and to set aside said judgment, was overruled and denied on June 29, 1896. Thereafter, on June 30, 1896, plaintiff filed an appeal bond in the sum of $11,000, which was duly approved, and appeal granted. Thereafter, on the 15th day of July, 1896, defendant gave notice to plaintiff that on July 27, 1897, she would apply for an order for alimony, pending the appeal of said case, and on said date last mentioned the judge made a decree, ordering and adjudging that plaintiff pay to defendant, within ten days, $250 for her support, as alimony at the rate of $150 per month from the date of the said former decree, viz, June 13, 1896; and the further sum thereafter of $150 per month in advance, from the 1st day of August, 1896, during the pendency of the action; and the further sum of $500 as counsel fees.

Thereafter, in the supreme court, the appellee, defendant below, on the 27th day of January, 1897, filed in the supreme court her motion, prepared on January 23, 1897, for an order dismissing said appeal, for the reason that appellant had not complied with the decree and order last above referred to, and on the same date, viz, January 27, 1897, her attorneys, Messrs. Kibbey, Barnes, Millay, and Bennett, filed a motion to remit all of the judgment of the district court for alimony and

attorneys' fees, in excess of $5,000, to-wit: the sum of $250.

It will be observed that at the date of the judgment the amount decreed in favor of defendant was $5,250; that plaintiff perfected his appeal on June 30, 1896; that thereafter the court decreed that plaintiff should pay defendant $150 per month; that $250 was due to August 1, 1896; that in addition thereto he was to pay her $500 for counsel fees. Due at the date of said motion, viz, January 27, 1897:

Original judgment	$5,250.00
Alimony to August 1, 1896	250.00
Alimony per month thereafter to February 1, 1897	900.00
Counsel fees	500.00
Making in all	$6,900.00

The bond on appeal was both an appeal and a stay bond. After it was executed, approved, and filed, the appeal was complete, and the district court no longer had jurisdiction of the case.

R. S. of 1887, paragraph 865.

The case then was under the jurisdiction of the supreme court on appeal, and said court had jurisdiction of the case, as it was on the date the final judgment was entered by the district court.

'Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted.'

R. S. of 1887, paragraph 817.

It is evident from said paragraph and from the remaining paragraphs of the chapter of the statutes to which it belongs, that the remitter can only be entered

in the district court, and only in that court before an appeal has been perfected, excepting as is provided by the following:

'If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the supreme court, in the same manner as such release is required to be made in the district court; * * *'

The course to be pursued in entering a remitter not in term time, is pointed out and directed by paragraph 818, R. S. of 1887. That course was not pursued in this case, and even if the case at bar was such in which a remitter could be entered, the appellee failed to pursue the course prescribed by law and the judgment has to remain as it was entered in the district court.

It will be observed, however, that the right to remit is given only to a plaintiff. It is evident that the right is given to one who has instituted a suit to recover a money judgment or property of a certain value, that he may make a verdict or judgment which is in excess of the amount claimed, a valid verdict or judgment by having them correspond with the allegations of the complaint, or to correspond with the evidence on the trial. In the case at bar, the judgment was for $5,250; to secure an appeal and a stay of the judgment, plaintiff was required by law to execute a bond for at least double that sum. A bond in a smaller sum would not have stayed the execution.

The right of appeal from the district to the supreme court is fixed on a value of the matter in controversy, at $200. Suppose the judgment of the district court exceeds that sum and an appeal is taken,

can it be successfully maintained, that after the appeal has been perfected, the appellee can destroy the jurisdiction of the supreme court by entering a remitter so as to bring the amount just under $200?

Again, suppose a suit should be instituted in a court for a sum in excess of the jurisdiction of said court, could jurisdiction be retained by the plaintiff, after judgment, remitting all in excess of the jurisdictional sum? We contend that a remitter can only be made to correct an error in the verdict or judgment, by reason of the fact that the verdict or judgment is in excess of the amount claimed, or that the evidence does not support the verdict or judgment.

It is apparent that in the effort to remit the insignificant sum of $250 that it was the purpose of appellee to prevent the case from going to another tribunal for review, by having the judgment reduced to just $5,000. As stated before, this is not an action for a money judgment. The money part of the judgment is a mere incident. It was imposed, in our judgment, without any legal authority, hence we think tho judgment should be reversed, and the case dismissed.

O. G. ROUSE,
Associate Justice, Supreme Court."

It is therefore confidently submitted that the judgment below should be reversed.

Respectfully submitted,

L. E. PAYSON,
For Appellant.

Appeal 1894

of Barnes for Appellant Clerk.

Filed Aug. 3, 1894.

...E OF APPELLEE TO MOTION TO DISMISS APPEAL.

...the Supreme Court of the United States,

October Term, 1894.

...TES T. SIMMS,
Appellant.

vs.

...NAH T. SIMMS,
Appellee.

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Wm H. Barnes

In the Supreme Court of the United States,

October Term, 1897.

JAMES T. SIMMS,
Appelant.

vs.

HANNAH T. SIMMS,
Appellee.

Comes now the appellee, by her counsel in that behalf, and moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the judgment or decree from which said appeal purports to have been taken, is the judgment or decree of the Supreme Court of one of the Territories of the United States, to-wit: The Supreme Court of the Territory of Arizona, affirming a judgment or decree of a District Court of said Territory, dismissing a bill for divorce brought by said appellant against said appellee in said District Court, and awarding appellee alimony and counsel fees PENDENTE LITE; and for the further reason that the matter in dispute does not exceed the sum of Five Thousand Dollars, exclusive of costs.

W. H. BARNES,
Counsel for Appelle for the purpose of this motion.

In the Supreme Court of the United States.

JAMES T. SIMMS,
Appellant.
vs.
HANNAH T. SIMMS,
Appellee.

Brief of Appellee on Motion to Dismiss Appeal.

STATEMENT.

This is a bill for divorce brought in the District Court of Maricopa County, Arizona, by James T. Simms, appellant, against his wife, Hannah T. Simms, Appellee

The bill was filed October 6th, 1894, and such proceedings were had in the cause that on the 13th day of June, 1896, a final decree was entered in the cause, dismissing appellant's bill and awarding appellee one hundred and fifty dollars per month from December 14th, 1893, to the date of said decree as alimony PENDENTE LITE, and seven hundred and fifty dollars counsel fees, which decree and order of entry of same, are as follows:

TITLE OF COURT AND CAUSE.

This cause having heretofore come on for hearing, and having been referred to a referee, and the testimony therein having been taken, and after the same having been argued to the court by counsel for respective parties hereto, and the same having been considered, and the judge being absent from the district and having filed a decision in writing. It is here ordered in accordance with the conclusion therewith, that the plaintiff take nothing by his bill of complaint; and that his complaint be dismissed and that the issues therein be and are hereby decided in favor of the defendant; and that the defendant is entitled to seven hundred and fifty dollars per month for her maintenance since the 14th day of December, 1893, and judgment is ordered accordingly.

JNO. J. HAWKINS,
District Judge.

TITLE OF COURT AND CAUSE.

The decision and judgment in this cause of the Hon. J. J. Hawkins, Judge of the Fourth Judicial District of the Territory of Arizona before whom the cause was tried, having been transmitted to and filed with the Clerk of this Court; and it appearing by the certificate of the Clerk of this Court, that on the 6th day of June, 1896 and seven days prior hereto, the Clerk of this court notified in writing the parties to this suit that the said decision and judgment has been filed with him. It is therefore ordered and directed that the said decision and judgment be entered of record in this court as the decision and judgment of this court.

Dated this 13th day of June, 1896.

A. C. BAKER, Judge.

This cause was appealed to the Supreme Court of the Territory of Arizona and said appeal was perfected on the 29th day of June, 1896.

On the 26th day of January, 1897, appellees filed in said cause, in the Supreme Court of Arizona her remittitur as follows:

TITLE OF COURT AND CAUSE.

Comes now the defendant and appellee herein, Hannah T. Simms, by J. H. Kibby, Millay & Bennet, and W. H. Barnes, her attorneys and remits from the judgment for alimony and counsel fees recovered by the said defendant and appellee, against the plaintiff and appellant herein, in this cause in the District Court, all of the said judgment for alimony and counsel fees, in excess of the sum of Five Thousand ($5,000) Dollars, to-wit the sum of Two Hundred and Fifty ($250) Dollars.

Dated this 26th day of January, 1897.

J. H. KIBBY,
MILLAY & BENNETT,
W. H. BARNES,
Attys. for Defts. and Appellee.

Attest:

J. L. B. ALEXANDER,
[SEAL] Clerk of the Supreme Court of Arizona.

On the 23d day of February, 1897, the Supreme Court affirmed the judgment and decree of the court below, which said judgment of affirmance is as follows:

February 23d, 1896.

TITLE OF CAUSE.

This cause having been heretofore submitted and by the court taken under consideration and the court having considered to same, and being fully advised in the premises. It is ordered that the judgment of the lower court, herein be and the same is hereby affirmed, and it is further ordered, adjudged and decreed that the appellee herein and Wm. Christy and P. J. Cole, the sureties on the Appeal Bond herein, pay the sum of Fifty-Two Hundred and Fifty Dollars and her costs in this court taxed at ninety-seven dollars.

From which judgment of affirmance, appellant appeals to this court.

BRIEF.

I.

We think this court has no jurisdiction in divorce proceedings. Appeals to this court from the Supreme Court of the Territories of the United States, are limited by Chapter 355 of Acts of Congress of 1885, to suits of law and in equity in which the matter in dispute, exclusive of costs, exceeds the sum of Five Thousand Dollars.

We understand the "matter in dispute" is the subject of litigation, the matter for which the suit is brought, and upon which issue is joined.

1 Wall (U. S.) 337.

3 Dall (U. S.) 401.

In an action for divorce the "matter in dispute" is the personal status, the bonds of matrimony existing between the parties. That only is the issue. It certainly cannot be maintained that alimony PENDENTE LITE, to enable the defendant wife to defend herself, is the "matter in dispute" The granting of alimony PENDENTE LITE is a matter discretionary with the trial court. It is aside from and a mere incident to the suit for divorce and its amount in most jurisdictions is not subject to review upon appeal, and we do not think it can be relied upon to confer jurisdiction on appeal to this court. This court would certainly not have jurisdiction on appeal to review a decree granting or refusing a divorce without alimony, and temporary alimony being a mere incident to the issue, is properly to be regarded more as costs in the case and therefore outside the matter in dispute. This is the view already taken by this court.

In Barber vs. Barber, Mr. Justise Wayne, speaking for the court, says:

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceedings in chancery or as an incident to divorce A VINCULO, or to one from bed and board."

Barber vs. Barber, 21 How. (U. S.) 582.

The Statutes of Arizona with reference to divorce provide as follows:

"If the wife, whether complainant or defendant, has not sufficient income for her maintenance during the pending of the suit for divorce, the judge may, either in term time or vacation, after due notice, allow her a sum for her support, in proportion to the means of the husband until a final decree shall be made in the case."

Par. 2020 Revised Statutes of Arizona, 1887.

II.

The appellee having remitted all of the said judgment for alimony in excess of $5,000, this court is without jurisdiction.

The revised Statutes of Arizona with reference to remitters, provides as follows:

"817. (Sec. 169.) Any party in whose favor a verdict or judgment has been rendered may in open court remit any part of such verdict or judgment and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitteed."

"818. (Sec. 170.) Any party may make such remitter in vacantion by executing and filing with the clerk a release in writing signed by him or his attorney of record and attested by the Clerk with the seal of his office, such release shall constitute a part of the record of the cause and any execution thereafter issued shall be for the balance only of the judgment after deducting the amount remitted."

"935. (Sec. 297.) If in any judgment rendered in the district court there shall be an excess of damage rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court; it shall be lawful for the party whose favor such excess of damages has been rendered to make such release in the supreme court in the same manner as such release is required to be made in the district court; and

upon such release being filed in said supreme court, the said court after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

In this case it will be observed, the appeal was taken to the Supreme Court of the Territory immediately after the decree was entered in the District Court and before appellee had remitted any part of the alimony given her by that decree but before the hearing upon the appeal in the Supreme Court, the appellee remitted all of said alimony above the sum of Five Thousand Dollars, (see statement above) which had the effect under the Sections of the Statute above cited, to reduce the said judgment or decree to the sum of Fve Thousand Dollars, without any action of the court to that effect, and the affirmance of the said judgment and decree by the Supreme Court of the Territory was an affirmance of the judgment so reduced to the sum of Five Thousand Dollars.

The judgment of the Supreme Court above shown, is merely the clerk's entry of judgment in the judgment docket. So far as it is affirmance of the judgment of the lower court it is correct, but as far as it assumes to enter a judgment in the Supreme Court of the Territory against the appellant and his sureties on the appeal bond for Five Thousand Two Hundred and Fifty Dollars it is unauthorized and void as before the judgment in the Supreme Court, the judgment of the lower court had been reduced by the remittitur to the sum of Five Thousand Dollars, and no execution could or can be issued for more than that sum.

Par. 816 Rev. Statutes of Arizona.

This court has repeatedly decided that where a judgment is reduced by remittitur to Five Thousand Dollars or less this court is without jurisdiction.

Thompson vs Butler, 95 U. S. 694.

Opeleka City vs. Daniel. 109 U. S. 103.

Alabama Gold. L. Ins. Co., vs. Nichols, 109 U. S. 232.

First Nat. Bank vs. Redick, 110 U. S. 224.

Tex. & Pac. R. R. Co., vs. Horn, 151 U. S. 110.

For the reasons above given the appeal in this cause should be dismissed.

Respectfully submitted.

WILLIAM H. BARNES,
Attorney for Appellee.

SIMMS *v.* SIMMS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 16. Submitted October 10, 1899. — Decided November 20, 1899.

No appeal lies to this court from a decree of the Supreme Court of a Territory granting or refusing a divorce.

From a decree of the Supreme Court of a Territory, dismissing the suit of a husband for a divorce, and awarding to the wife alimony and counsel fees, amounting in all to more than the sum of $5000, an appeal lies to this court so far as regards the sum of money.

The disclaimer in *Barber* v. *Barber*, 21 How. 582, 584, of "any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to a divorce *a vinculo*, or to one from bed and board," has no application to the jurisdiction of the courts of a Territory, or to the appellate jurisdiction of this court over those courts.

The statutes of the Territory of Arizona, authorizing any party, in whose favor a judgment for a sum of money has been rendered in a district court of the Territory, to file in that court, or in the Supreme Court of the Territory on appeal, a remittitur or release of part of the judgment, are applicable to a wife in whose favor a decree for alimony and counsel fees has been made in a suit brought against her by her husband for a divorce; and such a release by her attorneys of record of part of the sum awarded by the district court, if filed and recorded in the Supreme Court of the Territory, while the case is there pending on appeal, is such a substantial and sufficient compliance with the statute (although the release itself is not attested by the clerk and under his seal) as to make it the duty of the court to give effect to the release.

When a party who has recovered judgment, in a district court of a Territory, for a sum of money sufficient to sustain the appellate jurisdiction of this court from the Supreme Court of the Territory, exercises a right given by the territorial statutes of remitting, by a release filed and recorded in that court while the case is there pending on appeal, so much of the judgment as will reduce it below the jurisdictional amount, and that court ignores the release and affirms the judgment of the district court, this court, on appeal by the other party, will modify the judgment of the Supreme Court of the Territory so as to stand as a judgment for the reduced sum, and will affirm the judgment as so modified, without considering the merits of the case.

THE suit was commenced by a complaint filed October 6, 1894, in a district court of the Territory of Arizona, by a hus-

band against his wife for a divorce from the bond of matrimony for the cause of desertion on and ever since December 18, 1893. The wife's answer denied the desertion alleged, and set up desertion by the husband on and ever since December 14, 1893, as well as cruelty on his part.

The Revised Statutes of 1887 of the Territory of Arizona, tit. 34, c. 4, vest the jurisdiction of suits for divorce in the district courts of the Territory; and the only provisions thereof touching alimony, counsel fees or costs, are copied in the margin.[1]

Pending this suit, the wife, by her counsel, moved the court to order the husband to pay her the sum of $5000 as provisional alimony to enable her to employ counsel and defend the suit. The court made no order on the motion until its final decision of the cause upon its merits; and then, on a review of the whole evidence, (which had been taken by a referee and made part of the record,) held that the suit could not be maintained, overruled a motion for a new trial, allowed a bill of exceptions, and by a decree entered June 13, 1896, adjudged that the complaint be dismissed and the issues therein decided in favor of the defendant, and that she recover $750 counsel fees, and $150 a month for her maintenance from December 14, 1893, amounting in all to the sum of $5250, exclusive of costs. On June 30, 1896, the husband appealed to the Supreme Court of the Territory, and gave bond to prosecute his appeal.

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[1] "2114. The court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property."

"2120. If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case."

"2122. The court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or her own costs, as to the court shall appear reasonable."

Statement of the Case.

The record of the Supreme Court of Arizona (a copy of which, duly certified by its clerk, was transmitted to this court) stated that on the 11th and 13th days of January, 1897, respectively, each described as "being one of the judicial days of the January term, 1897, of the Supreme Court of Arizona," orders were made fixing the times of filing briefs. The record then stated that "on the 26th day of January, 1897, a release of part of the judgment of the lower court for alimony was filed in said court in said cause by said appellee," and set forth a copy thereof, by which it appeared to have been signed by her attorneys of record, with no other attestation than this blank form: "Attest, —— ——, Clerk of the Supreme Court of Arizona." And the release was indorsed by the clerk as filed on that day. By the release so filed and recorded, the wife "remits, from the judgment for alimony and counsel fees recovered by the said defendant and appellee against the plaintiff and appellant herein in this cause in the district court, all of the said judgment for alimony and counsel fees in excess of the sum of $5000, to wit, the sum of $250."

The provisions of the Revised Statutes of Arizona of 1887, on the subject of the right of a party to remit part of the sum awarded by verdict or judgment, are copied in the margin.[1]

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[1] "817. Any party in whose favor a verdict or judgment has been rendered [in the district court] may in open court remit any part of such verdict or judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitted.

"818. Any party may make such remitter in vacation, by executing and filing with the clerk a release in writing, signed by him or his attorney of record, and attested by the clerk with the seal of his office; such release shall constitute a part of the record of the cause, and any execution thereafter issued shall be for the balance only of the judgment after deducting the amount remitted."

"822. A remitter" "made as provided in any of the preceding sections shall, from the making thereof, cure any error in the verdict or judgment by reason of such excess."

"945. If in any judgment rendered in the district court there shall be an excess of damages rendered, and, before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the Supreme Court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such re-

On January 30, 1897, the case was submitted on briefs to the Supreme Court of the Territory; and on February 23, 1897, that court affirmed the judgment of the district court for $5250. The husband took an appeal to this court, which has been prosecuted by his executors since his death; and the whole case was submitted to this court on briefs.

The appellee moved to dismiss the appeal for want of jurisdiction, "because the judgment or decree, from which said appeal purports to have been taken, is the judgment or decree of the Supreme Court of one of the Territories of the United States, to wit, the Supreme Court of the Territory of Arizona, affirming a judgment or decree of a district court of said Territory, dismissing a bill for divorce brought by said appellant against said appellee in said district court, and awarding appellee alimony and counsel fees *pendente lite;* and for the further reason that the matter in dispute does not exceed the sum of five thousand dollars, exclusive of costs."

Mr. L. E. Payson for appellants.

Mr. W. H. Barnes for appellee.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

The motion to dismiss this appeal for want of jurisdiction is made upon two grounds: 1st. That the decree appealed from is a decree dismissing a suit for divorce, and awarding to the appellee alimony and counsel fees pending that suit. 2d. That the matter in dispute does not exceed the sum of five thousand dollars, exclusive of costs.

The Revised Statutes of the United States conferred on this court jurisdiction, upon writ of error or appeal, to review and

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lease in the Supreme Court in the same manner as such release is required to be made in the district court; and, upon such release being filed in said Supreme Court, the said court, after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

reverse or affirm the final judgments and decrees of the Supreme Courts of any Territory except Washington, "in cases where the value of the matter in dispute," (or as elsewhere described, "where the value of the property or the amount in controversy,") "to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars," and, in the Territory of Washington, two thousand dollars; and also in all cases in any Territory, arising under the Constitution and laws of the United States, or in which the Constitution or a statute or treaty of the United States is brought in question; and in all cases upon writs of *habeas corpus* involving the question of personal freedom. Rev. Stat. §§ 702, 1909–1911. By the act of March 3, 1885, c. 355, except in cases in which is involved the validity of a patent or a copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, "no appeal or writ of error shall hereafter be allowed from any judgment or decree, in any suit at law or in equity, in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." 23 Stat. 443. This act has not repealed the provision of the Revised Statutes giving an appeal from the Supreme Court of a Territory in cases of *habeas corpus*. *Gonzales* v. *Cunningham*, 164 U. S. 612. The act of March 3, 1891, c. 517, transferring to the Circuit Courts of Appeals the appellate jurisdiction from the Supreme Courts of the Territories in cases founded on diversity of citizenship, or arising under the patent, revenue or criminal laws, or in admiralty, has not otherwise affected the appellate jurisdiction of this court from the territorial courts. 26 Stat. 828, 830; *Shute* v. *Keyser*, 149 U. S. 649; *Aztec Mining Co.* v. *Ripley*, 151 U. S. 79.

Under the existing acts of Congress, therefore, (except in the cases so transferred to the Circuit Courts of Appeals, and in cases of *habeas corpus*, cases involving the validity of a copyright, and cases depending upon the Constitution or a statute or treaty of the United States — none of which classes

includes the case at bar) the appellate jurisdiction of this court to review and reverse or affirm the final judgments and decrees of the Supreme Court of a Territory includes those cases, and those cases only, at law or in equity, in which "the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

In order to sustain the appellate jurisdiction of this court, under such an enactment, the matter in dispute must have been money, or something the value of which can be estimated in money. *Kurtz* v. *Moffitt*, 115 U. S. 487, 495, 496, and cases there cited; *Durham* v. *Seymour*, 161 U. S. 235; *Perrine* v. *Slack*, 164 U. S. 452.

In support of the motion to dismiss this appeal because the decree below concerned divorce and alimony only, the appellee relied on *Barber* v. *Barber*, 21 How. 582. In that case, a majority of this court held that a wife who had obtained against her husband, in the courts of the State of their domicil, a decree, divorcing them from bed and board and awarding alimony to her, might sue the husband for such alimony in a Circuit Court of the United States held in a State in which he had since become domiciled. Mr. Justice Wayne, in delivering judgment, said: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce *a vinculo*, or to one from bed and board." 21 How. 584. And from that proposition there was no dissent. It may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States. *In re Burrus*, 136 U. S. 586, 593, 594.

But those considerations have no application to the jurisdiction of the courts of a Territory, or to the appellate juris-

diction of this court over those courts. In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power to the legislative assembly of a Territory. *Shively* v. *Bowlby*, 152 U. S. 1, 48, and cases cited; *Utter* v. *Franklin*, 172 U. S. 416, 423. In the exercise of this power, Congress has enacted that (with certain restrictions not affecting this case) "the legislative power of every Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States." Rev. Stat. § 1851; Act of July 30, 1886, c. 818; 24 Stat. 170. The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a State, are regulated by the laws of the State only. *Cope* v. *Cope*, 137 U. S. 682, 684.

By the territorial statutes of Arizona, the original jurisdiction of suits for divorce is vested in the district courts of the Territory; and their final judgments in such suits, as in other civil cases, may be reviewed by the Supreme Court of the Territory on writ of error or appeal. Arizona Rev. Stat. of 1887, tit. 34, c. 4; tit. 15, c. 20.

As already observed, the motion to dismiss, in the case at bar, is made upon the twofold ground that the decree appealed from is one concerning divorce and alimony only, and that it is for no more than $5000.

The decree of the Supreme Court of the Territory in favor of the wife includes the dismissal of the husband's suit for a divorce from the bond of matrimony, and the award to the wife, upon her motion, of the sum of $5250 for alimony and counsel fees.

So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on this appeal; both because that was a matter the value of which could not be estimated in

money; and because the refusal of the divorce involved no matter of law, but mere questions of fact, depending on the evidence, and which this court is not authorized to reëxamine. *Young* v. *Amy*, 171 U. S. 179.

The decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal, for the same reason that a judgment for or against the defendant upon a counter claim of like amount would support the appellate jurisdiction. *Dushane* v. *Benedict*, 120 U. S. 630, 636; *Stuart* v. *Boulware*, 133 U. S. 78; *Block* v. *Darling*, 140 U. S. 234.

It was argued for the appellee that the decree of the Supreme Court of the Territory in her favor for alimony and counsel fees was not really for more than the sum of $5000, because before that decree was rendered, or the case submitted to that court, she had filed a remittitur of the excess above that sum. But its final judgment, as actually entered, having been for the sum of $5250, the question whether the remittitur was erroneously disregarded touched the question what that court should have done, and not what it actually did; in other words, a question of error, and not of jurisdiction.

Had there been no local statute on the subject of remittitur, it would have been within the discretion of the court, before rendering judgment, to allow a remittitur reducing the sum recovered below the amount required to sustain an appeal; and, if the court had done so, and had rendered judgment for the reduced sum, the appeal must have been dismissed. *Alabama Ins. Co.* v. *Nichols*, 109 U. S. 232; *Pacific Telegraph Co.* v. *O'Connor*, 128 U. S. 394; *Texas & Pacific Railway* v. *Horn*, 151 U. S. 110.

The making of a remittitur, in this case, did not depend upon the discretion of the court, but was authorized and regulated by the statutes of the Territory. While the right of appeal to this court from the courts of the Territory is governed by the acts of Congress, the proceedings in the territorial courts are regulated by the territorial statutes.

The Revised Statutes of the Territory of Arizona contain full and explicit provisions upon this subject, which have been set forth in the statement prefixed to this opinion. They begin by providing that "any party in whose favor a judgment has been rendered" in the district court "may in open court remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes." This provision clearly includes any party, whether plaintiff or defendant, in whose favor a judgment for a sum of money has been rendered; and it is applicable to the case of a wife who has recovered a judgment for alimony and counsel fees. The provision of the next section is equally comprehensive, by which "any party may make such remitter in vacation, by executing and filing with the clerk a release in writing, signed by him or his attorney of record, and attested by the clerk with the seal of his office," and "such release shall constitute a part of the record of the cause." In whichever of those two ways the remittitur is made, it is provided that "any execution thereafter issued shall be for the balance only of the judgment after deducting the amount remitted," and that "the remitter shall, from the making thereof, cure any error in the judgment by reason of such excess."

Those statutes, in a subsequent section, provide that "if in any judgment rendered in the district court there shall be an excess of damages rendered, and, before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the Supreme Court, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the Supreme Court in the same manner as such release is required to be made in the district court."

This section again, construed together with the earlier sections, clearly authorizes either party, whether plaintiff or defendant, in whose favor a judgment for a sum of money has been rendered in the district court, and who has made no remittitur or release of part thereof in that court, to make the same in the Supreme Court of the Territory.

The section concludes by enacting that, "upon such release

being filed in said Supreme Court, the said court, after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

The only departure from the provisions of these statutes in the case at bar, as appearing by the record transmitted to this court, is that the clerk's attestation upon the defendant's release or remittitur was a blank form without the clerk's signature or the seal of his office. But the appellant in his brief, while contending in general terms that the course prescribed by the statute had not been pursued, made no specific objection to the proceedings except that the right to remit was given to the plaintiff only. And in the material parts of the record, as set forth in the brief of the appellee, the attestation to the release appears to have been signed by the clerk and under seal. It is possible that the signature and seal may have been inadvertently omitted in the record transmitted to this court. But, however that may have been, the attestation of a release filed in vacation, like the noting on the docket and entry in the minutes of a remittitur made in open court, was an act to be done by the clerk, and not by the party; its sole object in either case was to verify the act of the party; and when, as in this case, the release was executed by the party's attorneys of record, and was both filed and recorded in the Supreme Court of the Territory, while the case was pending in that court, we are of opinion that the statute was so substantially and sufficiently complied with as to render the release of part of the judgment below valid, and to make it the duty of that court to give effect to the release, and, according to the express terms of the statute, "after revising said judgment," to "proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

If that court had duly given effect to the release, and had rendered in other respects the same decree that it has rendered, the case would not have been appealable. This case is appealable because, and solely because, the decree rendered by that court is for a sum of more than $5000. If this court

were to dismiss the appeal, it could not modify the decree appealed from, and the appellee would retain a decree, not only for $5000, but also for $250 more, which she had legally remitted and released before that decree was rendered. If this court were to reëxamine the merits of the case, the appellant would have the full benefit of an appeal which he could not have taken at all, had that court acted rightly in a matter wholly independent of those merits.

The just and appropriate way of disposing of the case appears to this court to be to affirm the validity of the release or remittitur which the Supreme Court of the Territory erroneously ignored, to leave the case as if that court had performed its duty in this regard, and, without considering whether there was any other error in the decree for alimony and counsel fees, to order that the

Decree of the Supreme Court of the Territory of Arizona for $5250 be modified so as to stand as a decree for $5000, and, as so modified, affirmed, with costs.

Mr. Justice White and Mr. Justice Peckham dissented.